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91-1530

No.

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In The

Supreme Court of the United States

October Term, 1991

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, *et al.*,

Petitioners,

vs.

E.I. DU PONT DE NEMOURS & COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NORMAN SHAW
Attorney for Petitioners
1370 Avenue of the Americas
New York, New York 10019
(212) 956-0400

1786
Lutz Appellate Printers, inc. • NJ (908) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
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QUESTIONS PRESENTED

1. Whether the *Torres v. Oakland Scavenger Co.* holding under Fed.R.App.P. 3(c)'s specificity requirement, excluding from a group of sixteen appellants one who was not named in the body of the notice of appeal, controls when circuit courts have announced that when individual names of all appealing parties are not listed in the body of the notice of appeal in instances in which the generic term "plaintiffs" adequately and clearly identifies them for appellate jurisdiction.

2. Whether the lower courts erred in applying to the facts of this case, which does not involve a "products identification" issue, the principle found in *Celotex Corp. v. Catrett,* in light of the fact that the defendant Du Pont has admitted placing asbestos-containing products at the petitioners' workplace over the course of eleven years, and granting summary judgment based solely upon a letter containing an opinion of a proposed expert witness that does not address petitioners' claim of asbestos exposure *during* incineration of asbestos-containing material.

PARTIES TO THE PROCEEDING BELOW

The parties hereto are the same parties as in the proceedings in United States District Court for the District of New Jersey (No. 86-03324), and on appeal to the United States Court of Appeals for the Third Circuit (Nos. 90-5988 and 91-5206). James John Bradley and Catherine Bradley, his wife, et al.[1], are thepetitioners herin and E.I. Du Pont De Nemours & Company the respondent, and will be referred to as "petitioners" and "Du Pont" throughout this petition.

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[1] JAMES JOHN BRADLEY; CATHERINE BRADLEY, his wife; LUIS BASADRE; ARTHUR BELL; JAMES BENSON, JEANETTE BENSON, his wife; MARY PIETROPINTO, Administratrix Ad Prosequendum of JOSEPH PIETROPINTO, Deceased, and General Administratrix of the Estate of Joseph Pietropinto; FRANCESCO BOZZI, LAURA BOZZI, his wife; CURTIS BROWN, JR.; HERMAN BROWN; AUDREY BROWN, his wife; JOHN CAREW; REGINALD CAIN, JOSE CAMACHO; CARMEN CAMACHO, his wife; JOHN COLLINS; SHIRLEY COLLINS, his wife; LOUIS CURCIO; ANGELA CURCIO, his wife; BEN DAVIS; BERLINE DAVIS, his wife; CHARLES DEWITT; JULIA DEWITT, his wife; SAM EDMONDS; DORIS EDMONDS, his wife; CAL FAYARD; ROCHELLE FAYARD, his wife; EDWARD FIELDS; MARY FIELDS, his wife; JOSEPH FOGARTY; JESSE HINTON, JR.; ALICE HINTON, his wife; ISAAC JEFFRIES; CAROLYN JEFFRIES, his wife; JUAN JUAME; CARMEN JUAME, his wife; MOSES LAVAL; OLIVIA LAVAL, his wife; JOSEPH McLAUGHLIN; GENEVIEVE V. McLAUGHLIN, his wife; LOUIS MADARAZ; CLEMENT MARRA; CATHERINE MARRA, his wife; RALPH MORRELLO; CHRISTINE MORRELLO, his wife; EDWARD MORRIS; JEAN MORRIS, his wife; FERDINAND PENA; REGINA PENA, his wife; ANDRE PIERRE; PAUL POOLE; GERONICO QUINTANA; DELFINA QUINTANA, his wife; EMILIO RODRIGUEZ, Social Security No. 582-05-9377; WILFREDO RODRIGUEZ; MARIO SANTOS; OCTAVIA SANTOS, his wife; FRED SAVAGE; ALICE SAVAGE, his wife; CHARLES STATEN; MARY STATEN, his wife; DAVIS THOMAS; MARION THOMAS, his wife; WILLIAM TRIBLEY; DELORES TRIBLEY, his wife; LAWRENCE VENEIRO; ROSE VENEIRO, his wife; VASIL VISLOCKY;

(Con't)

(Con't)

MARY VISLOCKY, his wife; KENNETH WILLIAMS; ROBERT AUSTIN, JANE DOE AUSTIN, his wife, a fictitious name; CARLOS BARQUIN; JANE DOE BARQUIN, his wife, a fictitious name; ALBERT BRAVO; JANE DOE BRAVO, his wife, a fictitious name; RAY BUNN; JANE DOE BUNN, his wife, a fictitious name; DEWITT CANNON; JANE DOE CANNON, his wife, a fictitious name; EDWARD GOLDA, JANE DOE GOLDA, his wife, a fictitious name; KAZIMIERZ JAWOROWSKI; JANE DOE JAWOROWSKI, his wife, a fictitious name; ZDZISLAW KOWALSKI; JANE DOE KOWALSKI, his wife, a fictitious name; FELIX LANTIGUA; JANE DOE LANTIGUA, his wife, a fictitious name; KAZIMIERZ NITKOWSKI; JANE DOE NITKOWSKI, his wife, a fictitious name; JOSEPH PAGNOTTA; JANE DOE PAGNOTTA, his wife, a fictitious name; PAT REILLY; JANE DOE REILLY, his wife, a fictitious name; BASIL RIVERO; JANE DOE RIVERO, his wife, a fictitious name; EMILIO RODRIGUEZ, Social Security No. 138-36-6001; JANE DOE RODRIGUEZ, his wife, a fictitious name; MICHAEL SABAT, JANE DOE SABAT, his wife, a fictitious name; RUDY TROUPE; JANE DOE TROUPE, his wife, a fictitious name; ELIAS TZEMOS; JANE DOE TZEMOS, his wife, a fictitious name; LUIS ZAMORA; JANE DOE ZAMORA, his wife, a fictitious name; JAMES ZICARO; JANE DOE ZICARO, his wife, a fictitious name.

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E.I. DU PONT DE NEMOURS & COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinions of the District Court for the District of New Jersey in the civil case 86-03324 are unreported but are attached as Appendices C, E, and F. The first opinion of the Court of Appeals for the Third Circuit, civil case 90-5988, dated December 24, 1991 is unreported and is attached as Appendix B. A petition for panel rehearing with suggestion for rehearing in banc was denied pursuant to Order of the Court dated January 21, 1992 and is attached as Appendix A.

RULE INVOLVED

Federal Rule of Appellate Procedure 3 (c) states:

> [T]he Notice of Appeal shall specify the parties taking the appeal.
>
> [A]n appeal shall not be dismissed for informality of form or title of the Notice of Appeal.

STATEMENT OF JURISDICTION

The judgment of the Third Circuit Court of Appeals was made and entered on December 24, 1991. A petition for rehearing was filed on January 7, 1992. Rehearing was denied by Order of the Third Circuit dated January 21, 1992 (Appendix A). The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On March 18, 1991, all petitioners adversely affected by the granting of summary judgment on behalf of the respondents by the United States District Court, District of New Jersey, which had subject matter jurisdiction premised on 28 U.S.C. § 1332 because of diversity of citizenship and the requisite amount in controversy, pursuant to memoranda and order of such District Court dated February 21, 1991 (Appendix C) which included memoranda and orders dated October 19, 1990 (Appendix F) and December 4, 1990 (Appendix E), filed a timely notice of appeal pursuant to 28 U.S.C. § 1291.

The caption of the notice of appeal designated petitioners as "JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, *et al.*, Plaintiffs." The body of the Notice of Appeal unambiguously specified that "*the plaintiffs* hereby appeal to the United States Court of Appeals for the Third Circuit...." Appellate jurisdiction, however, was deemed by the Third Circuit as lacking to all parties except Mr. and Mrs. Bradley.

As to the second question presented, based on Du Pont's submission of a letter opining, without the benefit of testimonial scrutiny, that there was no asbestos exposure *after* incineration, the Third Circuit granted summary judgment even in light of the fact that petitioners' exposure claim was based on the burning of asbestos *during* incineration that lasted for hours in furnaces. Furthermore, petitioners' separate and independent claims for medical surveillance, emotional distress (Appendix H, Affidavits) arising from erroneous notification of asbestos exposure when as Du Pont admits six years later in its report that, in fact, only silica was present, and the claim for punitive damages based on Du Pont's corporate conduct that jeopardized the safety and health of workers were also stricken under misapplication of the summary judgment standard frequently announced by this Court. All reasonable inferences were erroneously not made in the non-moving parties' favor in light of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and its progeny. In fact, Dr. Peter M. Hay's report refuting Du Pont's opinion was not allowed into evidence (Appendix J).

During the years 1971 through 1982, Du Pont regularly sent to Engelhard Industries' Delancy Street plant in Newark, New Jersey waste material from Du Pont's manufacturing process which took place at its plant in Memphis, Tennessee, for the purpose of reclaiming the precious metal palladium from such waste material.

The waste material included, but was not necessarily limited to spent catalyst, palladium, asbestos-containing filter pads, organic solvents, and "filter-cake".

The material was shipped in Du Pont's own vehicles, and was contained in 55 gallon steel drums. Over the course of 11 years the material weighed almost one million pounds in the aggregate (Appendix K, Ted E. Lewis Letter). Du Pont indicated that it identifies this material by calling it "yellow label" catalyst. *Id.* When the material arrived at the Engelhard Delancy Street site it went through a refining process so as to permit the palladium to be retrieved and reclaimed on behalf of Du Pont.

The refining and reclaiming process for a particular amount of waste material typically took many unspecified hours, and involved primarily the incineration of the material that had been delivered in the 55 gallon drums. The incineration took place in large furnaces, primarily in Buildings 7 and 18 at the Engelhard location. The incineration process was extremely dusty and smokey. Such dust and smoke was emitted from the ovens and leaked into the buildings' interior and drifted through the buildings' smokestacks. This resulted in dust, ash and soot being deposited and settling on the ground, various objects near the buildings on the Engelhard site, property off the site owned and occupied by individual homeowners, businesses, and other land owners.

Prior to 1983, Du Pont did not advise any of the seven first-wave petitioners, any of the other co-petitioners in this lawsuit, any of the approximately 1,200 people at the Engelhard site who were in contact with the results of the incineration, or any of the other seven companies that it used for similar processing, or their employees, of the fact that the material that it had been sending them for processing, including incineration, contained asbestos.

Robert R. Bonczek, Director of Safety, Health and Environmental Affairs of Du Pont wrote a letter dated August 5, 1983 to the United States Environmental Protection Agency including statements concerning its use of asbestos-containing filters and in its reclaiming activity (Appendix K). Simultaneously, Du Pont caused two of its management personnel to visit the eight locations of the various processors so as to advise them personally for the first time of the fact that the material having been processed over the course of time had in fact contained asbestos. *Id.*

After Du Pont advised representatives of Engelhard in August of 1983 concerning the fact of the asbestos incineration, Engelhard in turn advised its employees of the fact. Engelhard management asked Du pont to return in early 1984 to give a full explanation of the situation. Du Pont, for the second time, sent representatives to Engelhard, so as to indicate the fact that the material that had been sent for 11 years to Engelhard had contained asbestos. *Id.* At that time there was no mention made of organic solvents. *Id.*

Engelhard offered its employees medical screening because of the asbestos exposure and sought medical cost reimbursement from Du Pont (Appendices M and K). The offer took place in August of 1984 and subsequently many employees did submit to medical examinations.

Thereafter for many months, there was discussion between Du Pont and Engelhard regarding the cost of the screening activity, with respect to who should bear such costs. *Id.*

Much Du Pont suspicious conduct after August of 1983 transpired which strongly supports the fact that the asbestos sent by Du Pont posed a health hazard to individuals, particularly those employed by and present at the plant sites of the eight processors located in New Jersey, New York, Missouri, Illinois and California (Appendix K). It is undisputed that Du Pont had knowledge of the fact that its material was going to be subjected to a refining process, including incineration.

Of the over fifty named petitioners, all. have claimed pulmonary disease, and the physician who has examined them has indicated that their pulmonary disease is of such nature as to have been caused or contributed to by asbestos exposure (Appendices I and J). Specifically, the disease is a form of pneumoconiosis which is a restrictive lung disease, and asbestos is one irritating agent that causes such lung pathology. Petitioners have exhibited a great deal of exposure to the refining process in Buildings 7 and 18 where the asbestos-containing material from Du Pont was refined and incinerated. While not all of the petitioners worked directly within one or both of those buildings during the entire thirteen years that the asbestos was being processed at Engelhard, they were all either in those buildings on a frequent basis during their employment at Engelhard, or worked in very close proximity to the buildings from which dust, fumes, smoke and soot from the incinerating process emanated, and was caused to be in the surrounding atmosphere before settling on individuals and objects in the vicinity (Appendix H, Affidavits).

SUMMARY OF ARGUMENT

A Writ of Certiorari must be granted on the scope of Fed.R.App.P. 3(c) because especially in light of some circuits, particularly, the Ninth and Second Circuits distinguishing the rationale of the *Torres v. Oakland Scavenger Co.* fact pattern involving the omission of one appellant from a group of sixteen appellants. Use of "the Plaintiffs" to specify over fifty plaintiffs in the body of the Notice of Appeal comports with Rule 3(c) because it is unambiguous and doesnot prejudice the respondent when in fact all petitoners intended to appeal. *Torres* does not require the individual listing of appellants because "the Plaintiffs" is a functional equivalent affording Du Pont adequate notice of the appeal.

The first revelation of asbestos exposure came from

Du Pont in 1983 after the respondent was caught by the United States EPA (Appendix K). By that action alone, principles of law regarding product identification found in *Celotex* and *Sholtis* instantly and irrevocably became and remained irrelevant to this case.

A significant error made by the trial judge and by the Third Circuit was to hold principles involving product identification issues as bearing on whether or not summary judgment should be granted in favor of Du Pont and against the petitioners.

This misapprehension of the appropriate use of *Celotex* requires the review of this Court in order to clarify that *Celotex* in fact should be limited to the cases involving product identification issues.

The law should be uniform with respect to having it clearly understood that the basic principles of summary judgment have not essentially been changed in *Celotex* except for the requirement that a claimant, in a toxic tort case with potentially many defendants, make some minimum showing as to the identity of producers or suppliers of toxic substances.

Du Pont's motion for summary judgment, given its broadest interpretation, is only directed to one of the petitioners' four claims for damages. The moving party's expert merely opined that there was no asbestos remaining *after incineration*, while the petitioners' primary claim was harm from asbestos exposure *during the incineration process*. Furthermore, in the aggregate, a jury could reasonably find that Du Pont's conduct created safety and health hazards for workers who were misinformed for over a decade as to the burning of asbestos.

A jury could reasonably conclude that the petitioners' claim of asbestos exposure resulted from the frequent and regular burning of Du Pont waste within the proximity of their daily work. Therefore, the Court should afford the petitioners an opportunity to present testimony as to asbestos exposure during the incineration process in deciding all reasonable inferences in favor of the petitioners by remanding for a trial on the merits.

REASONS FOR GRANTING THE WRIT

I.

A WRIT OF CERTIORARI MUST BE GRANTED ON THE SCOPE OF FED.R.APP.P. 3(C) BECAUSE OF CIRCUIT CONFLICT OVER WHETHER THE REQUIRED SPECIFICATION OF PARTIES TAKING AN APPEAL CONSISTENTLY UTILIZING *ET AL.* AND "THE PLAINTIFFS" PRESENTS A JURISDICTIONAL BAR TO THE APPEAL.

Rule 3(c) on its face states that "[t]he notice of appeal shall specify the parties taking the appeal." Rule 3(c) expressly demands that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." Furthermore, the suggested form of a notice of appeal, designated "Form 1 in the Appendix of Forms", (Appendix L), is silent as to the outright exclusion of *et al.*

As a widely-used legal syntax originating in old English common law for "and others", *et al.* has been continually and liberally utilized by the legal profession throughout American jurisdictions. The Court, however, in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317-18 (1988), held that where the *body* of the *notice* named fifteen of the sixteen appellants, and the caption was in the form of naming one plaintiff, *et al.*, "[p]laintiffs in intervention", the notice was deemed insufficient to specify the missing appellant, Mr. Torres.

Du Pont de Nemours & Co. contends that the caption of the notice of appeal designating petitioners as "JAMES JOHN

BRADLEY and CATHERINE BRADLEY, his wife, *et al.*, Plaintiffs", simultaneously with the body of the notice of appeal consistently referring to all parties as plaintiffs creates a jurisdictional bar (Appendix G). Nowhere in *Bradley* was there ever the blatant confusion of *Torres* in excluding one or even a few of the petitioners, which number over fifty parties.

Petitioners contend that *Torres* is factually and legally distinguishable from *Bradley* because of the absence of specifically omitting some parties while naming others. Du Pont was not in the least ever burdened or prejudiced from such a caption.

The applicability of the *Torres* decision is limited by its own language in that the opinion states:

> [T]he requirements of the rules of procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on the merits. Thus, if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.

Torres, 487 U.S. at 318.

Du Pont merely states that it was "prejudiced" by only having the names of the Bradley couple rather than each and *every* petitioner when in fact Du Pont presumed all along that "*et al.*" and "plaintiffs" meant what they have always meant to ordinary people, namely to include *all* individuals in the group.

The *Bradley* caption and the body of the notice of appeal are consistent. "Plaintiffs" is a term that every reasonable person understands as to whom it applies. "Plaintiffs" fulfills the purpose of universally naming all parties. As such, courts should not put themselves in the position of failing to recognize what is apparent to the rest of the world. "Plaintiffs" should not be construed as Orwellian doublespeak.

Immediately after *Torres*, the Fifth Circuit created a common-sense exception to Rule 3 (a)'s specification requirement. *Pope v. Mississippi Real Estate Com'n,* 872 F.2d 127, 129 (5th Cir. 1989). If the notice of appeal includes "*et al.*," in the context of a two-party action, it is sufficient to designate the appeal of both parties. If an appellee shows no surprise, detrimental reliance, or prejudice in a two-party action, generic use of "*et al.*" in a multi-party action, with no contradictions or inconsistencies whatsoever in an appellant's papers, also cannot surprise the appellee. Where there is no possibility that the appellant's violation is harmless, forfeiture of the appeal is an excessive sanction.

Under an expansive reading of *Torres*, appellees will be able to secure the dismissal of unnamed appellants no matter how meritorious the appellant's claims and no matter how obvious the appellant's intention to seek appellate review. Such result is inconsistent with Rule 2's express authorization permitting courts of appeals to forgive noncompliance where good cause for such forgiveness is shown. In this case, destroying the claims of all but John and Catherine Bradley would pervert the intention of *Torres*.

Federal Rule of Appellate Procedure 26(b) requires that a federal appellate court may not enlarge the time for filing a notice of appeal under Rule 4(a)'s 30 day limit after the date of the entry of the judgment appealed from. In *Torres*, the Court held that Rule 26(b) bars a court from enlarging the time limits for filing a notice of appeal. Such issue does not exist in this case.

In *Bradley*, reasonable parties such as Du Pont assumed that all parties from the lower court were in fact appealing. There was no Rule 26(b) time enlargement or prejudice to this respondent. Even if the Court accepts *Torres*' weak assumption that adding a party to the appeal extends the time limits for filing a notice of appeal, no such extension took effect in *Bradley*. Nowhere in the respondent's brief was the mere allegation of prejudice ever substantiated in detail by du Pont. What prejudice occurred to du Pont remains to this date a mystery.

Because the actual intent of Rule 3(c) appears to be ambiguous by simultaneously mandating specificity and also mandating leniency for informality of form or title of the notice of appeal, the *Torres*' majority should have addressed some policy arguments to support its conclusion. The Court identifies no policy supporting, let alone requiring this harsh rule. Courts of Appeals should have the power to correct injustices. If a defendant is allowed to escape responsibility by capitalizing on a suspect omission, when plaintiffs have an obvious intention to appeal as a collective body, nothing short of perverse justice materializes.

With no policy reasons behind the majority's decision, the United States Supreme Court is once again called upon to give clear guidelines as which rules of appellate procedure will be interpreted to provide fairness and which rules will be interpreted to aid the flow of administration of justice. Jeffrey L. Kirchmeir, *Torres v. Oakland Scavenger Co.: What's In A Name? — Everything In A Federal Appeal*, 39 Case W. Res. L. Rev. 943 (1989).

The federal rules were designed to reject the approach that pleading is a game of skill in which one misstep by counsel is decisive to the outcome and to accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Rule 2 embraces the concept that, upon a showing of good cause, courts of appeals are permitted to "suspend the requirements or provisions of any of these rules in a particular case." As argued here, the Rule 26(b) exception that discourages enlarging "the time for filing a notice of appeal" set out in Rule 4, should not be the touchstone that binds the *Bradley* case because of *Torres*. An unnamed party effectively appeals where a notice is timely filed and the unnamed party's intention to join in the appeal is clear to all and prejudicial to none. *See, e.g. Harrison v. United States*, 715 F.2d 1311, 1312-13 (8th Cir. 1983); *Williams v. Frey*, 551 F.2d 932, 934 n.1 (3rd Cir. 1977), then Rule 4's mandatory time limitations would remain inviolate. *Torres*, 487 U.S. at 321.

So narrow was the *Torres* holding that the Ninth Circuit, the circuit that originally ruled *Torres*, about-faced in *Nat'l Center for Immigrants' Rights v. INS*, 892 F.2d 814 (9th Cir. 1989). In *INS*, the court held that the use of the term "defendants" in the body of INS's notice of appeal fairly indicated that all, and not just some of the named defendants were appealing the decision. In the case, the caption of notice read as follows:

National Center For Immigrant's Rights, Inc. et al.,
Plaintiffs,
v.
Immigration and Naturalization Service, et al.,
Defendants.

The body of the notice stated in pertinent part that: "[N]otice is hereby given that defendants in the above-referenced action hereby appeal". *Id.* at 815. Distinguishing *Torres*, the court clearly held that the term "defendants" used in the body of the notice fairly indicated that *all* and not just *some* of the defendants were appealing the decision below. *Id.* at 816.

The *INS* court further held that "*Torres* does not require that the individual names of appealing parties be listed in instances in which a generic term, *such as plaintiffs* or defendants, *adequately* *identifies* them." *Id.* (emphasis added).

Similarly, this Court should hold that it is manifestly improper for an appellate court to read the words "the plaintiffs" in the body of the *Bradley* notice as meaning only one plaintiff. It means what it says it means. Plaintiffs, in its normal usage, means all plaintiffs and not just one or some. *See INS*, 892 F.2d at 817. Had only some *Bradley* plaintiffs intended to appeal, the proper term to be used in the body of the notice would have been "certain plaintiffs." Alternatively, if only some plaintiffs desired to appeal, those plaintiffs could have identified themselves individually.

II.

TORRES DOES NOT REQUIRE THE INDIVIDUAL NAMES OF THE APPEALING PARTIES TO BE LISTED WHERE "THE PLAINTIFFS" CONSISTENTLY AND ADEQUATELY IDENTIFIES ALL APPELLANTS.

Circuit courts around the nation have not been consistent as to the application of *Torres'* translation. The *Torres* Court translated the phrase "*et al.*" as meaning "and others," rather than "and *the* others." The best translation of the *Bradley* caption is "JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, and the others, Plaintiffs," because the context shows that "*et al.*" was intended to refer to all the others. This Court should not dismiss any of the other plaintiffs in *Bradley* because the designation is artful. This result would comport with Rule 3(c)'s prohibition against dismissal of an appeal "for informality of form" in the notice of appeal. Furthermore, the *Torres* mandate, disallowing the negligent omission of a specific appellant while naming individually the other appellants, would remain intact.

The Advisory Committee Notes on Rule 3's 1979 Amendments states that "so long as the *function* of the notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with." Such treatment should be afforded the *Bradley* plaintiffs. The syntax use of "the plaintiffs" should be accorded the functional equivalent status of a plaintiff-by-plaintiff listing.

In addition to the Ninth Circuit, the Second Circuit has also distinguished *Torres'* punishing announcement. In *Baylis v. Marriott Corp.*, 906 F.2d 874, 876 (2nd Cir. 1990), the notice of appeal bore a caption styled:

> JAMES BAYLIS, ET AL.,

and stating that:

> JAMES BAYLIS, et al., [sic] all of the plaintiffs
> in this action, hereby appeal....

The Court concluded that the technically-faulty original notice of appeal was adequate for jurisdictional purposes as to all plaintiffs. *Id.* "All of the plaintiffs in this action" was considered enough of a precise indication as to *which* parties sought to appeal.

The Second Circuit has taken a reasonable expansive view of what constitutes a functional equivalent under Rule 3. *See Ass'n of Am. Med. Colleges v. Cuomo,* 913 F.2d 55 (2nd Cir. 1990). In *Cuomo*, the cross-appellees, numbering eighteen New York state officials, were not listed as appealing parties individually in the appeal caption. *Id.* The *Cuomo* court held that the phrase "the defendants in the above matter hereby appeal" in the notice of appeal was also a functional equivalent of naming each and every defendant in the action. *Id.* at 56. The *Cuomo* notice of appeal complied with the specificity requirements of Rule 3 (c). *Id.* at 55.

Likewise, the expression "*et al.*" is not so clearly ambiguous as to instantly create hardship or prejudice. Similarly, using the words "the plaintiffs" in its unambiguous plural meaning should also be extended functional equivalent status. Even *Torres* allows this plain meaning and usage of the English language when the Court considers a technical defect to be immaterial if the notice of appeal contains such a "functional equivalent" of a listing of each appealing party's name. *Torres*, 487 U.S. at 317.

The United States Court of Appeals for the Third Circuit has, implicitly acknowledged that Third Circuit law is unyielding, strict and discomforting when applying *Torres*. *See* Appendix B, Docket No. 91-5206, Memo. Opinion at 14 (Dec. 24, 1991). The appellate court furthered acknowledged that *Ass'n of Am. Med. Colleges v. Cuomo* and *Nat'l Center for Immigrants' Rights v. INS* may reflect the better rule of law than Third Circuit law dogmatically following *Torres*. *Id.* at 15.

None of the Third Circuit cases cited by Du Pont, however, are factually the same as *Torres*. The Third Circuit has overly applied *Torres'* holding in cases not involving an omission of one or some appellants in the text of the notice. *Torres* should be applicable only in those narrow circumstances involving an omission. The *Bradley* matter is not such an omission case.

As the Ninth Circuit, the same circuit with which this Supreme Court agreed in its treatment of the original *Torres* case, has distinguished *Torres* in the *INS* case when "defendants" was utilized in the caption and notice of appeal. The Court is requested to expand the *INS* rule nationally when "plaintiffs" is utilized. All the *Bradley* plaintiffs, therefore, deserve their day in the court.

III.

DU PONT'S MOTION FOR SUMMARY JUDGMENT, GIVEN ITS BROADEST INTERPRETATION, IS DIRECTED TO ONLY ONE OF THE PETITIONERS' FOUR CLAIMS FOR DAMAGES.

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (in asbestos product identification case involving fifteen corporations, respondent failed to identify exposure to the petitioner's products). In a summary judgment motion, the nonmoving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Rule 56(e) also requires that when a nonmoving party bears the burden of proof at trial as to a dispositive issue, that party is required to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324. For an issue of fact to be genuine, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita*, 475 U.S. at 586. Issues of material fact are genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As stated in New Jersey, all inferences of doubt are drawn *against* the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 110 A.2d 24 (1954).

Reliance on an expert's letter to eradicate totally all reasonable inferences in favor of a non-moving party oversteps the summary judgment standard. The petitioners recognize that exposure to friable asbestos must be established as a substantial factor in causing the petitioners' serious and sometimes fatal pulmonary and cancer conditions. Du Pont's motion for summary judgment was directed as to whether or not, as a matter of law, the petitioners raised a jury question as to whether their pulmonary disability was a result of the contribution of asbestos exposure from Du Pont's waste materials. The matter of exposure was the *only* issue discussed in Du Pont's expert's opinion letter (Appendix N). Du Pont's expert opinion should have been narrowly read as only addressing the question of the causation of bodily injury. In view of Dr. Joseph J. Aaron's indication that petitioners suffered from restrictive disease, asbestos exposure is an issue of material fact to be decided by a jury in weighing the testimony of any experts' opinions presented at trial.

The trial judge barred claims based upon Du Pont's letter in negating the petitioners' claim for medical surveillance, the claim for emotional distress created because of asbestos exposure, without forewarning or knowledge, over the course of eleven years. This claim includes fear of not only lung disability but lung cancer and other forms of malignancies. The claim for punitive damages is based upon Du Pont's conduct of knowingly, deliberately, and intentionally failing to advise petitioners that the waste material involved in the palladium recovery reclamation incineration process contained asbestos. Further, Du Pont's refusal to advise the individual petitioners of such exposure even to this day, after the situation had continued for thirteen years is actionable.

The emotional distress suffered by the petitioners is based on their not having been advised of the incineration of asbestos over an eleven year period, coupled with an awareness of the fact that asbestos causes diseases which are progressive, and which sometimes involve a long latency period before manifestation of disease.

The major anxiety and fear of the petitioners appears to be the development of various forms of cancers, in particular lung cancer. Periodic medical surveillance can alleviate the concern and distress that petitioners have experienced in being told that nothing serious has yet developed. These Engelhard employees cannot be expected to be relieved of anxiety concerning the future, in light of their lung disease, simply because Du Pont's expert contends that the petitioners' pulmonary disease is not asbestos-related. Petitioners who will suffer an enhanced risk of disease as a result of asbestos exposure may recover emotional-distress damages based on the reasonable fear of future disease when exposure has resulted in physical injury. *Mauro v. Raymark Indust., Inc.*, 116 N.J. 126, 137 (1989), *see, e.g., Devlin v. Johns-Manville Corp.*, 202 N.J. Super. 556, 560-63 (Law Div. 1985).

Regardless, petitioners' increased risk of developing lung cancer due to asbestos exposure does not at all depend on individuals having asbestos-related pulmonary disease (Appendix J, Dr. Aaron's 9/6/90 Report at 3). There is no medical evidence that individuals exposed to asbestos who have developed asbestos-related lung diseases are more likely to develop lung cancer, throat cancer, gastrointestinal cancer, or other various forms of cancer, than are similarly exposed individuals who have *not* developed pulmonary disease. *Id.*

Even if it were established that pulmonary disease suffered by the petitioners is not asbestos-related, this finding would be medically irrelevant on the propriety of petitioners being periodically examined. Petitioners' apprehension about the development of lung cancer or other forms of cancer will not subside.

Under New Jersey law, petitioners who will suffer enhanced risk of disease as a result of exposure to asbestos may recover damages for enhanced risk of disease when such contraction of disease is probable. *Mauro*, 116 N.J. at 136. Medical surveillance damages, without regard as to the likelihood that a party will *ultimately* develop disease, are recoverable. *Id.* at 136-37. The petitioners' medical surveillance claim seeks reimbursement for the specific dollar costs of periodic examinations that are medically necessary notwithstanding the fact that the extent of petitioners' impaired health [may be] unquantified. *Ayers v. Jackson Twnshp.*, 106 N.J. 557, 606 (1987).

Du Pont apparently does not dispute the concept that examinations of people exposed to asbestos over the course of over a decade would be in order. Du Pont's actions in notifying the other seven processors about the asbestos exposure clearly implies that medical surveillance is indicated.Du Pont engaged in dialogue with Engelhard Industries over the cost of providing medical examinations to the exposed individuals, up to approximately 1,200 in number, without its making any suggestions that those examinations were not necessary (Du Pont Employee T.E. Lewis, Aug. 20, 1984 Letter). Du Pont has historically been involved in medical surveillance programs with workers in other locations throughout New Jersey. *See, generally, Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161 (1985).

Therefore, the summary judgment standard in *Celotex* should not negate claims made by the non moving party which are never addressed in the moving party's motion for summary judgment based on such party's expert opinion as to only proximate cause, especially since *Celotex* was based on product identification. Furthermore, summary judgment was prematurely granted because overreliance on depositions should be avoided. A plaintiff is not required to state his entire case at the time of giving a deposition. The party is only obligated to answer whatever questions are put to him. Only at trial will it be the obligation of the petitioners to describe in full detail their contact with and around buildings 7 and 18 where the Du Pont asbestos was being incinerated, and their contact and exposure in areas affected by the burning asbestos.

IV.

THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT SOLELY ON THE BASIS OF RESPONDENT'S EXPERT OPINION THAT THERE WAS NO ASBESTOS REMAINING *AFTER INCINERATION* BECAUSE SUCH CONCLUSION IS NOT DISPOSITIVE AS TO PETITIONERS' CLAIM OF ASBESTOS EXPOSURE *DURING THE LENGTHY INCINERATION PROCESS.*

A. The Existence of Sufficient Evidence Supporting Reasonable Inferences That Health Hazards Were Created by Du Pont's Conduct Precludes the Granting of Summary Judgment in Respondent's Favor.

Dr. Clifton G. Bergeron, the expert witness for Du Pont, did not posit that Du Pont's "yellow label" material containing asbestos was not airborne during the overnight incineration process (Appendix N). Nowhere in Bergeron's report was the petitioners' main theory of asbestos releasing fibers into the air *during* incineration ever rebutted. *Id.* Dr. Bergeron was of the opinion that "*after* incineration" the *residual* material contained no asbestos." The expert further relied on the observation of William J. Bareford, a Du Pont employee, that the interior of the furnace was "an[] almost blinding white color" as his basis for the opinion that the temperature in the furnace was over 1202 degrees fahrenheit. *Id.* Further, Dr. Bergeron's reliance on Engelhard's undated air pollution permit stating that the furnace exhaust gas discharge temperature could go up to 1550 degrees fahrenheit does not necessarily mean that chrysotile asbestos did in fact *instantly* decompose into forsterite and silica.

Petitioners' claims, based upon Du Pont's revealing in 1983 that its materials contained asbestos, are directed to the processing that involved incineration for many hours in the furnaces, as well as the processing by way of sifting and grinding the incinerator ash that was removed from the furnaces. Therefore, petitioners' claim of airborne asbestos exposure *during* the incineration of Du Pont's material has not been addressed by Dr. Bergeron's letter.

The opinion of Bergeron's letter is at most only dealing with the latter phase of the reclamation process. The opinion does not address exposure before or during the process under the petitioners' drift theory.

Moreover, petitioners contend that ample evidence from the record shows that Du Pont's conduct indicates that the incinerated asbestos *did in fact* become airborne. This conduct includes, but is not limited to, the Du Pont's Director of Safety, Health and Environmental Affairs, Robert Bonczek, telling the EPA in 1983 in part "...disposal of the filters by incineration...might result in the potential release of airborne levels of the bound asbestos fibers" (Appendix K at 101a); Du Pont's failure to announce that there was no exposure to asbestos, since it had been purportedly converted into silica; the fact that Du Pont was subsequently willing to pay a cost penalty premium of at least $24,000 to have asbestos-containing filter pads incinerated following notification to the various processors of the asbestos content of the filter pads (Appendix K, 110a and 112a); the fact that Du Pont engaged in "damage control" by rushing its representatives to fly around the country to personally perform notification (Appendix K); the fact that Du Pont's correspondence, including distribution of an article entitled "The Pathogenesis of Asbestos-Associated Disease" (*id.*), regarding the notification states that the purpose of the notification was to allow the processors to evaluate whether the asbestos had in fact become airborne (*id.*); and the fact that throughout all the communications with Engelhard after the notification regarding medical surveillance of Engelhard employees, and liability for such a program, Du Pont never once indicated to Engelhard that none of that was valid because there was no possibility of airborne asbestos. *Id.*

These facts were *introduced and established* by Du Pont itself; the defendant has not denied such conduct. Du Pont's aggregate conduct, read in the light most favorable to the petitioners, is uniformly inconsistent with any idea that there in fact was no likelihood that asbestos fibers would become airborne. Du Pont's conduct was more than simply a warning of the possibility of asbestos exposure. Rather, it reasonably may be interpreted as reflecting Du Pont's knowledge that the health risk existed. With such divergent viewpoints existing, a material factual issue is present.

"The relevant weight and sufficiency of expert and opinion testimony are generally regarded as matters that fall within the particular province of the jury." 31A Am. Jur. 2d, § 129 at 137. There is no requirement that a jury accept expert opinion testimony in place of its own judgment. 31A Am. Jur. 2d, § 134 at 140.

> [W]here the questions presented are the appropriate subject of expert testimony, the court should have the opportunity to hear experts, observe their demeanor on the stand, and form an opinion with respect to the issues predicated on evaluation of their testimony. Opportunity should be given to both sides to cross examine experts, and the case is therefore not an appropriate one for summary judgment.

35B C.J.S. Fed. Civ. Proc. § 1146 at 545.

Furthermore, a trial court should be particularly cautious to grant summary judgment when a cause of action rests upon expert testimony. *Ruvulo v. American Cas. Co.*, 39 N.J. 490, 500 (1963).

> It is a matter of common knowledge that such judgments are to be granted with extreme caution. The moving party and the pleadings are to be considered most favorably to the party opposing the motion. All doubts are to be resolved against the movant. *It has been said on the federal scene (after whose rule [New Jersey's] is patterned) that a litigant has the right to trial where there is the slightest doubt as to facts.*

Id. at 499.

A "plaintiff must prove tortious conduct, injury and proximate cause" to prevail in a tort case. *Ayers*, 106 N.J. at 585 (1987); W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts* § 30, at 164-65 (1984). Proof of causation mandates that a plaintiff establish a sufficient nexus between the plaintiff's injury and the defendant's conduct. *Ayers*, 106 N.J. at 585. Fed .R. Civ. P. 56(c) commands summary judgment only when a plaintiff fails to establish that he was sufficiently exposed to the defendant's product. *See Celotex*, 477 U.S. at 322-28.

Petitioners have set forth specific facts disclosing that genuine issues for trial exist. In accordance with *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990), petitioners affidavits do set forth specific facts showing that a genuine issue for trial exists.

The district court erroneously opined that petitioners' affidavits contained only vague and conclusory allegations and were not based on personal knowledge (Appendix F, *Bradley v. Du Pont*, No. 86-03324, slip op. (D.N.J.) at 9). John Collins, a union official throughout his employment between 1970 and 1983, averred in his affidavit that Du Pont material in 55 gallon steel drums arrived and were loaded into the furnaces of buildings 7 and 18 (Appendix H at 69a). In Arthur Bell's affidavit, he states that he was assigned to work in building 18 where the processing involved a burning cycle in large furnaces. *Id.* at 78a. Only when Du Pont informed Engelhard of asbestos exposure in August of 1984 was Mr. Bell apprised of his association with the burning cycle while working during the 1970s and thereafter in building 18. *Id.* Curtis Brown avers in his affidavit that he was present in buildings 7 and 18, particularly during the years 1976 and 1982, a time period in which Du Pont waste was processed continually. *Id.* at 60a. The district court discounted Herman Brown's affidavit (Appendix H at 56a) because he "never worked [physically] in "buildings 7 and 18 where the Du Pont material was incinerated" (Appendix F, *Bradley v. Du Pont*, No. 86-3324, slip op. (D.N.J.) at 9). Herman Brown, however, was employed "near and around" those buildings very often, on a regular basis, since 1972 and past 1983, performing clean-up work. Herman Brown's maintenance duties were performed while smoke, dust and dirt was constantly emitted from the burning of Du Pont's materials (Appendix H at 56a). Such burning showered Herman Brown with incineration residue which could be smelled at even some distance from buildings 7 and 18. *Id.* Additionally John Carew, who spent a great deal of time in buildings 7 and 18 from 1972 through 1983 (Appendix H at 49a), was subjected to the settling of the burned ash for a significant time while working in or near the furnace buildings. Johnnie Gowans, a 10 year employee at buildings 7 and 18 died of laryngeal cancer. The deaths of Lawrence Veneiro and Joe Pietropinto, Engelhard employees during Du Pont's waste shipments, died of various cancers. Overall, plaintiffs were angered and outraged by Du Pont's concealment of asbestos (Appendix H).

B. Petitioners' Claim of Asbestos Exposure Resulting From Frequent and Regular Burning of Du Pont Waste Materials During Lengthy Incineration Periods While Working Within Proximity of Such Activity Precludes Summary Judgment.

Petitioners recognize their burden of proof at trial to demonstrate that Du Pont's "yellow label" material caused their injuries. The Third Circuit has erroneously overly relied upon *Sholtis v. American Cyanamid Co.*, 238 N.J. Super. 8 (App. Div. 1989). In *Sholtis*, the court held that plaintiffs could defeat a summary judgment motion by proving sufficiently frequent asbestos exposure, with a regularity of contact, and with the product in close proximity in a *product identification setting*; and that such factors should be balanced for a jury to find liability. *Id.* at 28 (citing *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986) (frequency, regularity and proximity test established)). As a trial is a search for the truth, courts should dispose of cases on their merits. *See Sholtis*, 238 N.J. Super. at 17.

Petitioners have shown enough evidence that their exposure was of more than a casual or minimum nature. Since proof of direct contact is almost always lacking, courts must rely upon circumstantial proof of sufficiently intense exposure to warrant liability. *Id.* at 29. In the opinion of Dr. Joseph Aaron, the petitioners' expert, asbestos exposure caused or exacerbated petitioners' injuries. The pulmonary conditions of the petitioners were the result of exposure in part to asbestos at Engelhard. *See* Appendix I at 81a, 87a, 89a. Herman Brown's asbestos exposure causes chronic bronchitis and pneumoconiosis. *Id.* at 81a. Arthur Bell's and James Benson's lung disabilities due in part to asbestos exposure at Engelhard were also noted by Dr. Aaron. *Id.* at 85a and 91a respectively.

Based on these reports alone, a material issue of fact has been created as to the proximate causation between Du Pont's asbestos and the exacerbated pulmonary conditions common to the petitioners. In the aggregate, these reports directly raise an issue of material fact as to the concept of proximate causation. The contact between the petitioners and the asbestos burning exposure *during* incineration is sufficiently significant so that a reasonable jury could determine that the product was a substantial factor in bringing about the petitioners' injuries. *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 168 (1979).

The Third Circuit has misapplied the "frequency, regularity, and proximity" test espoused in *Sholtis* for use in the identification of at least nine different defendant manufacturers as to allocating responsibility and imposing liability upon all of the defendants. Petitioners in this case *have not been* subjected to the products of different known manufacturers over a long period of time. *Sholtis* involved the proof of identifying individual liability of each of the nine defendants after the court had determined that no theory of collective responsibility applied. *Sholtis*, 238 N.J. Super at 26. *Celotex*, likewise, involved product identification among fifteen named corporations.

Unlike *Sholtis* or *Celotex*, the *exact source and quantity* of waste materials has been clearly identified. In fact, Du Pont's Occupational, Safety and Health manager, Ted E. Lewis notified Engelhard that the Newark, New Jersey site received and processed "yellow label" spent catalyst, containing at least 10% asbestos, from the Du Pont Memphis plant in the amount of 988,000 lbs. from 1971 to 1982 (Appendix K at 109a). Quantitatively, the frequency and regularity of asbestos incineration leading to exposure to the petitioners in or around the proximity of buildings 7 and 18 constitutes a material issue of fact. The petitioners have been exposed to multiple shipments and numerous lengthy incineration of Du Pont's waste.

When facing a proponent summary judgment motion, a plaintiff only needs to produce evidence from which a fact-finder, after assessing the proof of frequency and intensity of the plaintiffs' contacts with asbestos, could reasonably infer toxic exposure. *Sholtis*, 238 N.J. Super at 29. The affidavits, certifications and depositions must be read together, *giving plaintiffs all favorable inferences*. *Judson*, 17 N.J. at 75. As the *Sholtis* court suggested, when plaintiffs initially present their proofs, there is no recognized definitive standards defining exposure. *Sholtis*, 238 N.J. Super at 30. The Third Circuit, however, has not followed the summary judgment commandment of siding with the non-moving party as to all reasonable inferences. Since this case is not one of product identification, fairness dictates that the Court grant the writ of certiorari and allow argument on the merits.

CONCLUSION

Based upon all the foregoing, petitioners respectfully requests that their petition for writ of certiorari be granted

Respectfully submitted,

NORMAN SHAW

Attorney for Petitioners

Dated: March 18, 1992

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 21, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 91-5206

JAMES JOHN BRADLEY; CATHERINE BRADLEY, his wife; FREDERICK BANSBACH; MARY ELLEN BANSBACH, his wife; LUIS BASADRE; ARTHUR BELL; JAMES BENSON, JEANETTE BENSON, his wife; MARY PIETROPINTO, Administratrix Ad Prosequendum of JOSEPH PIETROPINTO, Deceased, and General Administratrix of the Estate of Joseph Pietropinto; FRANCESCO BOZZI; LAUPA BOZZI, his wife; CURTIS BROWN, JR.; HERMAN BROWN; AUDREY BROWN, his wife; JOHN CAREW; REGINALD CAIN, JOSE CAMACHO; CARMEN CAMACHO, his wife; JOHN COLLINS; SHIRLEY COLLINS, his wife; LOUIS CURCIO; ANGELA CURCIO, his wife; BEN DAVIS; BERLINE DAVIS, his wife; CHARLIES DE WITT,. JULIA DE WITT, his wife; SAN EDMONS; DORIS EDMONDS, his wife; JOSEPH ELINSKE; CAL FAYARD; ROCHELLE FAYARD, his wife; EDWARD FIELDS; MARY FIELDS, his wife; JOSEPH FOGARTY; JESSE HINTON, JR.; ALICE HINTON, his wife,; ISAAC JEFFRIES; CAROLYN JEFFRIES, his wife; JUAN JUAME; CARMEN JUAME, his wife; MOSES LAVAL; OLIVIA LAVAL, his wife; JOSEPH MC LAUGHLIN; GENEVIEVE W. MC LAUGHLIN, his wife; LOUIS MADARASZ; CLEMENT MARRA,; CATHERINE MARRA, his wife; RICHARD MENSEL, JULIA MENSEL, his wife; RALPH MORRELLO; CHRISTINE MORRELLO, his wife; EDWARD MORRIS; JEAN MORRIS, his wife; WILLIAM MULLEN; MADELINE MULLEN, his wife; FERDINAND PENA; REGINA PENA, his wife; ANDREA PIERRE; PAUL

POOLE; GERONICO QUINTANA; DELFINA QUINTANA, his wife,; EMILIO RODRIGUEZ, Social Security No. 582-05-9377; WILFREDO RODRIGUEZ; MARIO SANTOS; OCTAVIA SANTOS, his wife; FRED SAVAGE; ALICE SAVAGE, his wife; CHARLES STATEN; MARY STATEN, his wife; DAVIS THOMAS; MARION THOMAS, his wife; WILLIAM TRIBLEY; DOLORES TRIBLEY, his wife; LAWRENCE VENEIRO; ROSE VENIERO, his wife,; VASIL VISCOCKY; MARY VISCOCKY, his wife; HERMITT WARD; AMY WARD, his wife; ALFRED WILLIAMS, DELORES WILLIAMS, his wife; KENNETH WILLIAMS; WILLIAM WOLEN; JILL WOLEN, his wife; RICHARD ZUZZIO; PATRICIA ZUZZIO, his wife; ROBERT AUSTIN, JANE DOE AUSTIN, his wife, a fictitious name; CARLOS BARQUIN; JANE DOE BARQUIN, his wife, a fictitious name; ALBERT BRAVO; JANE DOE BRAVO, his wife, a fictitious name; RAY BUNN; JAME DOE BUNN, his wife, a fictitious name; DE WITT CANNON; JANE DOE CANNON, his wife, a fictitious name; ARMANDO CARDOSA; JANE DOE CARDOSA, his wife, a fictitious name; WALTER DIXON; JANE DOE DIXON, his wife, a fictitious name; EDWARD GOLDA; JANE DOE GOLDA, his wife, a fictitious name; KAZIMIERZ JAWOROWSKI; JANE DOE JAWOROWSKI, his wife, a fictitious name; ZDZISLAW KOWALSKI; JANE DOE KOWALSKI, his wife, a fictitious name; FELIX LANTIGUA; JANE DOE LANTIGUA, his wife, a fictitious name; KAZIMIERZ NITKOWSKI; JANE DOE NITKOWSKI, his wife, a fictitious name; JOSEPH PAGNOTTA; JANE DOE PAGNOTTA, his wife, a fictitious name; JOHN PIEGARI; JANE DOE PIEGARI, his wife, a fictitious name; PAT REILLY,; JANE DOE REILLY, his wife, a fictitious name; BASIL RIVERO; JANE DOE RIVERO, his wife, a fictitious name; EMILIO RODRIGUEZ, Social Security No. 138-36-6001; JANE

DOE ROGRIGUEZ, his wife, a fictitious name; MICHAEL SABAT, JANE DOE SABAT, his wife, a fictitious name; RUDY TROUPE; JANE DOE TROUPE, his wife, a fictitious name; ELIAS TZEMOS; JANE DOE TZEMOS, his wife, a fictitious name; LUIS ZAMORA; JANE DOE ZAMORA, his wife, a fictitious name; JAMES ZICARO; JANE DOE ZICARO, his wife, a fictitious name,

Appellants

v.

E.I. DU PONT DE NEMOURS & COMPANY, a corporation of the State of Delaware; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; JOHN DOE 5; JOHN DOE CORPORATION 1; JOHN DOE CORPORATION 2; JOHN DOE CORPORATION 3; JOHN DOE CORPORATION 4; JOHN DOE CORPORATION 5; JOHN DOE CORPORATIONS (6 through 50)

E.I. DU PONT DE NEMOURS & COMPANY, ETC.
Third Party Plaintiff

v.

SCOTT LABORATORIES, INC.; SCOTT LABORATORIES, LTD.,; ROBERT A. KEASBEY CO.;
Third Party Defendants

(D.C. Civil No. 86-03324)
SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Appendix A

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, *Circuit Judges* and FULLAM, *District Judge**.

The petition for rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

Circuit Judge

DATED: JAN 21 1992

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* The Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *BRADLEY V. DU PONT,* CIVIL NO. 91-5206 FILED DECEMBER 24, 1991

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5206

JAMES JOHN BRADLEY; CATHERINE BRADLEY, his wife; FREDERICK BANSBACH; MARY ELLEN BANSBACH, his wife; LUIS BASADRE; ARTHUR BELL; JAMES BENSON, JEANETTE BENSON, his wife; MARY PIETROPINTO, Administratrix Ad Prosequendum of JOSEPH PIETROPINTO, Deceased, and General Administratrix of the Estate of Joseph Pietropinto; FRANCESCO BOZZI; LAUPA BOZZI, his wife; CURTIS BROWN, JR.; HERMAN BROWN; AUDREY BROWN, his wife; JOHN CAREW; REGINALD CAIN, JOSE CAMACHO; CARMEN CAMACHO, his wife; JOHN COLLINS; SHIRLEY COLLINS, his wife; LOUIS CURCIO; ANGELA CURCIO, his wife; BEN DAVIS; BERLINE DAVIS, his wife; CHARLIES DE WITT; JULIA DE WITT, his wife; SAM EDMONS; DORIS EDMONDS, his wife; JOSEPH ELINSKE; CAL FAYARO; ROCHELLE FAYARD, his wife; EDWARD FIELDS; MARY FIELDS, his wife; JOSEPH FOGARTY; JESSE HINTON, JR.; ALICE HINTON, his wife,; ISAAC JEFFRIES; CAROLYN JEFFRIES, his wife; JUAN JUAME; CARMEN JUAME, his wife; MOSES LAVAL; OLIVIA LAVAL, his wife; JOSEPH MC LAUGHLIN; GENEVIEVE W. MC LAUGHLIN, his wife; LOUIS MADARASZ; CLEMENT MARRA; CATHERINE MARRA, his wife; RICHARD MENSEL, JULIA MENSEL, his wife;

RALPH MORRELLO; CHRISTINE MORRELLO, his wife; EDWARD MORRIS; JEAN MORRIS, his wife,; WILLIAM MULLEN; MADELINE MULLEN, his wife; FERDINAND PENA; REGINA PENA, his wife; ANDREA PIERRE; PAUL POOLE; GERONICO QUINTANA; DELFINA QUINTANA, his wife; EMILIO RODRIGUEZ, Social Security No. 582-05-9377; WILFREDO RODRIGUEZ; MARIO SANTOS; OCTAVIA SANTOS, his wife; FRED SAVAGE; ALICE SAVAGE, his wife; CHARLES STATEN; MARY STATEN, his wife; DAVIS THOMAS; MARION THOMAS, his wife; WILLIAM TRIBLEY; DOLORES TRIBLEY, his wife; LAWRENCE VENEIRO; ROSE VENIERO, his wife; VASIL VISCOCKY; MARY VISCOCKY, his wife; HERMITT WARD; AMY WARD, his wife; ALFRED WILLIAMS, DELORES WILLIAMS, his wife; KENNETH WILLIAMS; WILLIAM WOLEN; JILL WOLEN, his wife; RICHARD ZUZZIO; PATRICIA ZUZZIO, his wife; ROBERT AUSTIN, JANE DOE AUSTIN, his wife, a fictitious name; CARLOS BARQUIN; JANE DOE BARQUIN, his wife, a fictitious name; ALBERT BRAVO; JANE DOE BRAVO, his wife, a fictitious name; RAY BUNN; JAME DOE BUNN, his wife, a fictitious name; DE WITT CANNON; JANE DOE CANNON, his wife, a fictitious name; ARMANDO CARDOSA; JANE DOE CARDOSA, hi-s wife, a fictitious name; WALTER DIXON; JANE DOE DIXON, his wife, a fictitious name; EDWARD GOLDA; JANE DOE GOLDA, his wife, a fictitious name; KAZIMIERZ JAWOROWSKI; JANE DOE JAWOROWSKI, his wife, a fictitious name; ZDZISLAW KOWALSKI; JANE DOE KOWALSKI, his wife, a fictitious name; FELIX LANTIGUA,; JANE DOE LANIIGUA, his wife, a fictitious name; KAZIMIERZ NITKOWSKI; JANE DOE NITKOWSKI, his wife, a fictitious name; JOSEPH PAGNOTTA; JANE DOE PAGNOTTA, his wife, a fictitious name; JOHN PIEGARI; JANE DOE PIEGARI, his wife, a fictitious name;

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PAT REILLY,; JANE DOE REILLY, his wife, a fictitious name; BASIL RIVERO; JANE DOE RIVERO, his wife, a fictitious name; EMILIO RODRIGUEZ, Social Security No. 138-36-6001; JANE DOE ROGRIGUEZ, his wife, a fictitious name; MICHAEL SABAT, JANE DOE SABAT, his wife, a fictitious name; RUDY TROUPE; JANE DOE TROUPE, his wife, a fictitious name; ELIAS TZEMOS; JANE DOE TZEMOS, his wife, a fictitious name; LUIS ZAMORA; JANE DOE ZAMORA, his wife, a fictitious name; JAMES ZICARO; JANE DOE ZICARO, his wife, a fictitious name,

Appellants

v.

E.I. DU PONT DE NEMOURS & COMPANY, a corporation of the State of Delaware; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; JOHN DOE 5; JOHN DOE CORPORATION 1; JOHN DOE CORPORATION 2; JOHN DOE CORPORATION 3; JOHN DOE CORPORATION 4; JOHN DOE CORPORATION 5; JOHN DOE CORPORATIONS (6 through 50)

E.I. DU PONT DE NEMOURS & COMPANY, ETC.
Third Party Plaintiff

v.

SCOTT LABORATORIES, INC.; SCOTT LABORATORIES, LTD.; ROBERT A. KEASBEY CO.;

Third Party Defendants

On Appeal From the United States District Court for the District
of New Jersey (D.C. Civil No. 86-03324)
District Judge: Garrett E. Brown, Jr.

Appendix B

Submitted Under Third Circuit Rule 12(6)
September 19, 1991

Before: BECKER and HUTCHINSON, *Circuit Judges* and
FULLAM, *District Judge**

(FILED DEC 24 1991)

MEMORANDUM OPINION

BECKER, *Circuit Judge.*

This action was filed by seventy-two former employees of Engelhard Corporation ("Engelhard") and their spouses against E.I. du Pont de Nemours and Company ("du Pont"), alleging injuries resulting from exposure to asbestos-containing material supplied by du Pont to Engelhard. Plaintiffs appeal from orders of the district court for the District of New Jersey: (1) granting summary judgment to du Pont and twice denying rehearing thereof; (2) denying plaintiffs' motion to amend their complaint to include a cause of action for exposure to silica; and (3) denying plaintiffs' motion to reopen the record and amend answers to interrogatories to name an expert witness. For the reasons that follow, we will affirm.

I. BACKGROUND

From 1970 to 1982 du Pont sent to Engelhard the waste product of du Pont's manufacture of hydrogen peroxide at its

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* The Honorable John P. Fullam, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Memphis, Tennessee plant, a portion of which consisted of used filter pads. The pads were shipped to Engelhard for recovery of palladium, a precious metal which was used as a catalyst in du Pont's manufacturing process. Englehard's reclamation process consisted primarily of the incineration of the waste product in large furnaces, which, plaintiffs allege, produced smoke, dust, ash, and soot. In 1983, Engelhard learned that the filter pads contained ten percent asbestos. Three years later, plaintiffs initiated this lawsuit alleging that they had contracted pulmonary disease due to asbestos exposure from this material.

By order dated July 6, 1988 the district court dismissed the complaint as to eighteen of the seventy-two named plaintiffs and their spouses. Seven of the remaining fifty-four plaintiffs were designated as the "first wave" claimants, and discovery was conducted as to them. By memorandum and order dated October 19, 1990, the district court granted summary judgment against the seven first-wave plaintiffs and directed the remaining plaintiffs to show cause why their claims should not be dismissed for the same reasons. On December 4, 1990, the district court, by Memorandum and Order, denied the motion for reargument of the seven first-wave plaintiffs, and dismissed the claims of the remaining (non-first wave) plaintiffs. By memorandum and order dated February 21, 1991, the district court denied the various plaintiffs' motions for reargument of the December 4 order, denied plaintiffs' motion for leave to amend the complaint to include a cause of action for exposure to silica, and denied plaintiffs' motion to reopen the record to name an additional expert and to submit the expert's report. This timely appeal followed.

II. APPELLATE JURISDICTION

The caption of the notice of appeal identifies the appellants as

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JAMES JOHN BRADLEY and CATHERINE
BRADLEY, his wife, *et al.*

The text of the notice refers to the appellants only as "the plaintiffs." du Pont contends that, because appellants failed to specify by name the appealing plaintiffs, they have violated the requirements of FRAP 3(c), depriving us of appellate jurisdiction.

Plaintiffs submit that, because the appellants were identified in the text of the notice of appeal as "the plaintiffs," without limitation, du Pont was not misled or prejudiced by the failure to name specifically the appealing plaintiffs, and thus that the notice of appeal does not violate FRAP 3(c). They further argue that, because the notice of appeal includes as the subject of the appeal all of the orders relating to the ultimate grant of summary judgment, which was eventually granted against all plaintiffs, they have effectively designated the entire pool of plaintiffs as appellants, and therefore that no useful purpose would be served by requiring the names of each of the numerous parties to be specified in the notice of appeal. Plaintiffs urge us to construe FRAP 3(c) liberally, to avoid a construction that would allow "mere technicalities" to bar consideration of the case on its merits.

Rule 3(c) states, in relevant part, that the notice of appeal "shall specify the party or parties taking the appeal." Appellate Rules 3 and 4 constitute a "single jurisdictional threshold" such that "[t]he failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal." *Torres v Oakland Scavenger Co.*, 487 US 312, 314, 108 S Ct 2405 (1988). The phrase "et al." does not satisfy the Rule 3(c) specificity requirement, and failure to satisfy that requirement thus deprives the Court of Appeals of jurisdiction over the unnamed parties. 487 US at 317-18. See also *Cruz v*

Melendez, 902 F2d 232, 235 (3d Cir 1990) (court lacks jurisdiction over parties designated only under the "et al." label). We have held that the law requires this court "to insist on punctilious, literal, and exact compliance with the requirement in Rule 3(c) that the notice of appeal shall specify the party or parties taking the appeal." *Kowaleski v Director, OWCP*, 879 F2d 1173, 1176 (3d Cir 1989), cert denied, 493 US 1070, 110 S Ct 1114 (1990) (citing *Allen Archery, Inc. v Precision Shooting Equip. Inc.*, 857 F2d 1176, 1177 (7th Cir 1988)).

Bound by this precedent, and our discomfiture mollified by the conclusion that summary judgment was, at all events, properly granted to du Pont on the merits, we find du Pont's argument persuasive. We will therefore dismiss the appeal for lack of appellate jurisdiction as to all parties other than James John Bradley and Catherine Bradley who are clearly named as appellants in the notice of appeal.[1]

III. SUMMARY JUDGMENT

Plaintiffs submit that they have adduced sufficient evidence of conduct by du Pont to support the inference that a health hazard existed. They also claim to have adduced sufficient evidence of exposure to du Pont's asbestos to permit a reasonable jury to have returned a verdict in their favor. The instances of du Pont's conduct cited by plaintiffs are: (1) a letter from du Pont to the Environmental Protection Agency, dated August 5, 1983, which plaintiffs claim demonstrates du Pont's knowledge of the potential for airborne asbestos from the processing of the filter pads; (2) du Pont's willingness to pay a cost penalty to PGP Industries, Inc. for continued processing of the filter pads, which plaintiffs claim demonstrates du Pont's belief that there was danger of airborne asbestos as a result of incineration of the filter pads; (3) du Pont's notification of its various processors around the country (including Engelhard) about the presence of asbestos in the filter pads, which plaintiffs claim demonstrates the danger of asbestos exposure; (4) du Pont's correspondence with the EPA, which, plaintiffs claim, when compared with certain of du Pont's "admissions" in this case, demonstrate du Pont's knowledge of the asbestos content of the filter pads and therefore the existence of a "cover-up"; and (5) du Pont's failure to indicate to Engelhard during discussions that no employee medical monitoring was necessary, which plaintiffs claim demonstrates that there was airborne asbestos from the processing of the filter pads.

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[1] We acknowledge that some of the cases from other circuits cited by plaintiffs hold that the use of a generic term such as "the plaintiffs" or "the defendants" in the body of the notice of appeal, is sufficient to make clear that each and every party to the original action is a party to the appeal, even where no parties to the appeal are elsewhere specifically named. We further acknowledge that these cases hold that such a generic designation in the body of the notice of appeal might cure the label of "et al." in the caption. See, for example, *Ass'n of Am. Med. Colleges v Cuomo*, 913 F2d 55 (2d Cir 1990); *Nat'l Center for Immigrants' Rights v INS*, 892 F2d 814 (9th Cir 1989). Whether or not these cases reflect the better rule, we are bound by our own precedent.

Plaintiffs further argue that because du Pont's expert reports assert merely that there could be no airborne asbestos resulting from the processing of the asbestos-containing filter pads before incineration or after incineration, and because du Pont's expert reports do not assert that there could be no airborne asbestos resulting from the processing of the asbestos-containing filter pads during incineration, plaintiffs' failure to controvert those reports with their own expert's reports should not be held against them. Plaintiffs contend that a jury should have the opportunity to weigh du Pont's expert's reports.

In response, du Pont argues that summary judgment was properly granted because plaintiffs failed to establish the requisite causal connection between their alleged injuries and du Pont's asbestos-containing filter pads, that is, because appellants failed to demonstrate sufficient exposure to asbestos. First, du Pont contends that plaintiffs' claim of exposure is constructed of bare, vague, conclusory, and generalized allegations from their affidavits and contains no evidence that asbestos fibers were released during the incineration of the asbestos-containing filter pads. du Pont maintains that, after four years of discovery, plaintiffs must go beyond these generalized allegations, and that plaintiffs' reliance on du Pont's conduct in warning Engelhard of possible asbestos exposure is inadequate as proof of causation. Second, du Pont contends that plaintiffs failed to meet their burden of going forward by failing to present expert testimony either to substantiate their allegations of asbestos exposure or to contradict the expert reports submitted by du Pont. We note in this regard that, contrary to plaintiffs' contentions, these reports refute the notion that the asbestos in the filters was released when the filters were incinerated.

On appeal from an order granting summary judgment, we exercise plenary review. *Bushman v Halm*, 798 F2d 651, 656 (3d Cir 1986). We review the district court's refusal to *reconsider* its entry of summary judgment for abuse of discretion. *Robertson v Allied Signal, Inc.*, 914 F2d 360, 366 (3d Cir 1990). The standards for the grant of summary judgment are familiar and need not be repeated here. See *Celotex Corp. v Catrett*, 477 US 317, 322, 106 S Ct 2548 (1986); *Anderson v Liberty Lobby, Inc.*, 477 US 242, 249-50, 106 S Ct 2505 (1986).

Proximate cause is, of course, an element essential to appellants' case. According to New Jersey law, which is applicable in this diversity action, in order to defeat a motion for summary judgment, an asbestos-case plaintiff must establish proximate cause, satisfying the "frequency, regularity and proximity" test, that is, by producing evidence that he was exposed to the defendant's friable asbestos frequently and regularly, while in close proximity to it, and by offering competent proof, usually that of an expert, sufficient to establish a nexus between exposure to the defendant's asbestos and plaintiff's injuries. *Sholtis v American Cyanamid Co.*, 568 A2d 1196, 1207-08 (NJ Super Ct App Div 1989). Therefore, the question we are presented with is whether, from the evidence presented by plaintiffs, a jury could reasonably have inferred, either directly or circumstantially, on the basis of the law articulated in *Sholtis*, that plaintiffs' (and more particularly James Bradley's) injuries resulted from exposure to asbestos supplied by du Pont.[2] See *Bushman*, 798 F2d at 657 (citing *Anderson*, 477 US at 250-51).

We agree with the district court that a jury could not reasonably have so inferred, and that plaintiffs have failed to satisfy this standard for defeating a motion for summary judgment. We therefore affirm the grant of summary judgment to du Pont.

First, plaintiffs have not set forth insufficient evidence that asbestos was actually released into the air during the incineration of the asbestos-containing materials delivered by du Pont, or that the asbestos was otherwise friable. What evidence has been offered, in the form of affidavits, has been vague and totally conclusory, and thus, being void of specific facts, is insufficient to defeat a motion for summary judgment. See *Lujan v Nat'l Wildlife Fed'n*, 110 S Ct 3177, 3188 (1990) (conclusory allegations in an affidavit are no more sufficient than those in a complaint to defeat a Rule

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[2] Catherine Bradley's claim is for loss of consortium.

56 motion).[3] For example, paragraphs 8-12 of James Bradley's affidavit, which essentially concedes that Bradley was not assigned to work in the buildings where the incineration of the asbestos-containing filter pads took place,[4] assert merely that he was exposed to dust, fumes, smoke, and soot. Nowhere does Bradley claim that he was exposed to asbestos, let alone frequently or regularly, as *Sholtis* demands. And, considering the unrefuted expert evidence adduced by du Pont that there could be no airborne asbestos after the filter pads were incinerated, see below, we can conclude only that the dust, fumes, smoke, and soot to which James Bradley refers did not contain any du Pont-supplied asbestos. Furthermore, the evidence advanced by plaintiffs in their brief, see above, goes merely to the conduct of du Pont and is entirely immaterial to this requisite element of causation.

Second, plaintiffs, themselves having presented no expert testimony, have failed to contradict expert testimony presented on behalf of du Pont that there could have been no release of asbestos fibers either before, during, or after the incineration of the asbestos-containing filter pads. du Pont's expert testimony essentially establishes that the asbestos in the material supplied to Engelhard by du Pont was not friable. Such contradiction was needed if plaintiffs were to advance their "during the incineration" theory or indeed any other theory in support of plaintiffs'' claim of frequent, regular, and proximate exposure to friable asbestos. We therefore agree with the district court that summary judgment against plaintiffs was proper.

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[3] The only affidavit that we consider is that of James Bradley, for none of the other affidavits pertain to his exposure to asbestos, and they therefore are irrelevant to this appeal.

[4] These concessions in and of themselves prevent Bradley from meeting the "regularity" and "proximity" prongs of the *Sholtis* test.

Moreover, since plaintiffs in their two motions for reargument failed to cite any law or new evidence in support of those motions, we cannot say that the district court abused its discretion in refusing to rehear or reconsider its entry of summary judgment.

IV. THE MOTION TO AMEND THE COMPLAINT TO ALLEGE SILICA EXPOSURE

Plaintiffs challenge the district court's denial of their motion to amend their complaint to include a cause of action for exposure to silica. They argue that because du Pont's expert reports indicate that, during incineration, some asbestos would be converted into silica, plaintiffs must have been exposed to silica. Plaintiffs note that because the first they heard of the existence of silica at Engelhard was in the expert reports, they should have been permitted to amend their complaint to allege silica exposure.

In response, du Pont stresses that plaintiffs' motion came nearly one year after the close of discovery and over four and one-half years after plaintiffs initiated their lawsuit. In short, they assert undue delay and prejudice.

A trial court's denial of a motion for leave to file an amended complaint may be reversed only if it clearly abused its discretion. *Adams v Gould, Inc.*, 739 F2d 858, 863 (3d Cir 1984). Although leave to amend is liberally granted, see FRCP 15(a); *Centifanti v Nix*, 865 F2d 1422, 1431 (3d Cir 1989), and although in the absence of prejudice to the opposing party, mere delay in adding a new claim to a complaint is an insufficient reason to deny leave to amend, *Howze v Jones & Laughlin Steel Corp.*, 750 F2d 1208, 1212 (3d Cir 1984), we are still satisfied that the district court did not abuse its discretion here. First, the plaintiffs' motion was based on sheer speculation as to silica exposure and causation.

Second, in view of the extreme delay, du Pont would likely have been prejudiced by the injection of a new issue at so late a point in time. We will therefore affirm the district court's denial of plaintiffs' motion to amend its complaint.[5]

For the foregoing reasons, the orders of the district court will be AFFIRMED.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

DATED:

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[5] Plaintiffs also challenge the district court's denial of their motion to reopen the record and amend their answers to interrogatories in order to name an additional expert, and to submit his report, arguing that no prejudice would result to any party. We find the plaintiffs' late-filed motion without merit.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY IN CIVIL ACTION NO. 86-03324 BY HON. GARRETT E. BROWN, JR. ENTERED ON FEBRUARY 22, 1991

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 86-3324 (GEB)

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, *et al.*,

Plaintiffs,

v.

JOHN DOE I, *et al.*,

and

E.I. DU PONT DE NEMOURS & CO.,

Defendant/Third Party-Plaintiff,

v.

SCOTT LABORATORIES, INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third Party Defendants.

BROWN, District Judge

Appendix C

By Memorandum and Order dated October 19, 1990, this Court granted summary judgment in favor of Du Pont as to all claims by the seven "first wave" plaintiffs and their spouses. It further dismissed the cross-motions for summary judgment on behalf of Scott Inc., Scott Ltd., and Keasbey as moot. Finally, it ordered the remaining plaintiffs to show cause in writing why their claims should not be dismissed for the reasons set forth in that Memorandum and Order.

Thereafter by Memorandum and Order dated December 4, 1990 this Court denied plaintiff's motion for reargument and dismissed the remaining claims of the plaintiffs for the reasons set forth in the October 19, 1990 Memorandum and Order.

Presently before the Court is plaintiffs' second motion for reargument of this Court's October 19, 1990 Memorandum and Order, plaintiffs' motion for reargument of this Court's Order to Show Cause, plaintiffs' motion to amend the complaint to include a cause of action for exposure to silica, and plaintiffs' motion to reopen the record and to amend their answers to interrogatories so as to name an expert witness. For the following reasons, plaintiffs' motions are denied.

1. Motions for Reargument

General Rule 12(I) of the Local Rules for the United States District Court for the District Court of New Jersey provides:

> A motion for reargument shall be served and filed within 10 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice a memorandum setting forth concisely the matters or controlling decisions

> which counsel believes the Court has overlooked. No oral argument shall be heard unless the Court grants the motion and specifically directs that the matter shall be reargued orally.

In support of their motions for reargument, plaintiffs present no new evidence. They merely reassert the same arguments previously denied by this Court. Accordingly, for the reasons previously set forth, plaintiffs' motions for reargument must be denied.

2. Motion to Amend Complaint

As a general matter, courts freely should grant leave to amend pleadings when justice so requires. Fed. R. Civ. P. 15(a); *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984). Although the decision whether to grant or deny leave to amend lies within the sound discretion of the district court, the court may deny leave to amend if plaintiff's delay in seeking the amendment is undue, motivated by bad faith or dilatory motive, or results in undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Adams v. Gould*, 739 F.2d 858, 864 (3d Cir. 1984). Prejudice is the touchstone of whether to allow an amendment to a pleading. *Howze*, 750 F.2d at 1212. In the absence of prejudice to the opposing party, the addition of a new claim in a complaint is an insufficient reason to deny leave to amend. *Id.*

At this late date, four and one-half years after the filing of their complaint, almost one year after the discovery cut-off, eight months after this Court had denied a similar request to amend their complaint,[1] and after dismissal of their entire case, plaintiffs seek to amend their complaint to include a cause of action for exposure to silica.

In *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), *petition for cert. filed*, December 21, 1990, the Third Circuit denied plaintiff leave to amend the complaint where the amendment would have injected new issues into the case, required additional discovery and where the motion was made four and one half months after the close of discovery. Similarly, here the Court will deny plaintiffs' motion to amend their complaint.

A new cause of action for exposure to silica would certainly inject a new issue into the case. Moreover, granting plaintiffs' leave to amend their complaint would likely result in prejudice to the defendants and would require further discovery.

3. Motion to Reopen Record and Amend Answers to Interrogatories to Name Expert Witness

Plaintiffs base their motion on General Rule l(A) of the Local Rules for the United States District Court for the District Court of New Jersey. Rule l(A) provides that a court may relax or dispense with any rule if adherence to that rule would result in surprise or injustice. Nothing in this rule would allow this Court to grant the relief plaintiffs are presently seeking. Fed. R. Civ. P. 60(b) would be more relevant to plaintiffs' motion to reopen the record. Rule 60(b) provides that a court may relieve a party from a final judgment if newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial is presented.

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[1] By Memorandum and Order dated May 7, 1990, this Court denied plaintiffs' motion to amend their complaint to add allegations of injury based on exposure to chemicals because it was both too late and unsupported by any expert evidence.

Plaintiffs have not, however, met this burden. Du Pont submitted its expert report over one year ago, yet plaintiffs choose not to submit their own expert report until two months after this Court granted summary judgment in favor of Du Pont. The Third Circuit consistently has denied motions to reopen the record where to do so would prevent the orderly and efficient disposition of cases. *See, e.g., Page v. Schweiker*, 786 F.2d 150 (3d Cir. 1986) (affirming district court's denial of Rule 60(b) motion to present additional evidence based on "legitimate concerns about the orderly and expeditious resolution" of the case); *Plisco v. Union Railroad Co.*, 379 F.2d 15 (3d Cir.) (affirming district court's denial of Rule 60(b) motion in absence of showing by movant that reasonable diligence would not have brought new evidence to court's attention), *cert. denied*, 389 U.S. 1014 (1967).

Plaintiffs had ample opportunity to present an expert report before this Court granted Du Pont's motion for summary judgment, yet failed to do so. They have not demonstrated that the expert report is newly discovered evidence or that it could not earlier have been discovered by due diligence. Plaintiffs' motion to reopen the record and to amend their answers to interrogatories so as to name an expert witness must therefore be denied.

For the foregoing reasons,

It is on this 21st day of February, 1991

ORDERED that plaintiffs' motions for reargument be and are hereby denied; and it is is

FURTHER ORDERED that the plaintiffs' motion to amend the complaint be and is hereby denied; and it is

FURTHER ORDERED that plaintiffs' motion to reopen the record and to amend their answers to interrogatories to name an expert witness be and is hereby denied.

Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

APPENDIX D — VOLUNTARY DISMISSAL UPON PLAINTIFFS' MOTION WITHOUT PREJUDICE BY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *BRADLEY V. DU PONT*, CIVIL NO. 90-5988 FILED JANUARY 24, 1991

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 90-5988

Bradley, et al.

vs.

I Du Pont De Nemours, et al.

James John Bradley, Appellant

(New Jersey District Civil No. 86-03324)

ORDER

In accordance with the agreement of the parties in the above entitled case, it is entered dismissed by the Clerk under the authority conferred upon her by Rule 42(b), Federal Rules of Appellate Procedure without prejudice.

Sally Mrvos
Clerk
United States Court of Appeals
for the Third Circuit

Date: January 24, 1991

cc:

Marc J. Gordon, Esq.
Thomas L. Morrissey, Esq.
Matthew S. Slowinski, Esq.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY IN CIVIL ACTION NO. 86-03324 BY HON. GARRETT E. BROWN, JR. ENTERED ON DECEMBER 4, 1990

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 86-3324

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, *et al.*,

Plaintiffs,

v.

JOHN DOE I, *et al.*,

and

E.I. DU PONT DE NEMOURS & CO.,

Defendant/Third Party-Plaintiff

v.

SCOTT LABORATORIES, INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third-Party Defendants.

Appendix E

MEMORANDUM AND ORDER

BROWN, District Judge

By memorandum and order dated October 19, 1990, this court granted summary judgment in favor of Du Pont as to all claims by the seven "first wave" plaintiffs and their spouses. It further dismissed the cross-motions for summary judgment on behalf of Scott Inc., Scott Ltd., and Keasbey as moot. Finally, it ordered that the remaining plaintiffs show cause in writing why their claims should not be dismissed for the reasons set forth in the memorandum and order.

Presently before the court is plaintiffs' motion for reargument of defendant Du Pont's motion for summary judgment and this court's order to show cause why the remaining claims should not also be dismissed. For the following reasons; plaintiffs' motion is denied and the claims of the remaining plaintiffs are dismissed for the reasons set forth in this court's prior memorandum and order.

1. Motion for Reargument

General Rule 12(I) of the Local Rules for the United States District Court for the District Court of New Jersey provides:

> A motion for reargument shall be served and filed within 10 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked. No oral argument shall be heard unless the court

> grants the motion and specifically directs that the matter shall be reargued orally.

Plaintiffs argue that the court has overlooked the "fact" that the "conduct" by Du Pont indicates that the asbestos became airborne during incineration and that the expert reports on which this court relied in issuing its decision have no relevance to any matters between the parties.

Plaintiffs argument with regard to Du Pont's "conduct" is clearly meritless. The record shows that Du Pont merely alerted the public as to the possibility of asbestos exposure. Plaintiffs have cited this court to no case law which holds that a general warning of possible exposure constitutes proof of causation. Moreover, plaintiffs' contention that the expert reports have no relevance is also factually unsupported. Plaintiffs argue that the expert reports do not address the issue of exposure during the incineration process.

The expert report of Dr. Bergeron states that "after incineration the residual material contained no asbestos." According to the report, the asbestos contained in the filter pads was heated "to a temperature well in excess of that required to effect thermal decomposition." Dr. Pape also issued an expert report in which he discussed the entire processing of the filter pads prior to reaching the conclusion that plaintiffs were not exposed to airborne fibers from filter pads. The asbestos, according to the experts, was destroyed during the incineration and plaintiffs have produced no proof to the contrary.

2. Order to Show Cause

This court ordered the remaining plaintiffs to show cause in writing why their claims should not be dismissed for the reasons set forth in its October 19, 1990 memorandum and order. Plaintiffs have not submitted any new evidence which would sufficice to defeat a motion for summary judgment. Plaintiffs merely repeat the arguments raised in their memorandum in support of their motion for reargument. As previously stated, these arguments are meritless.

Plaintiffs raise one last argument in support. They claim that the expert reports are purely advisory in character and that a court must be cautious in granting summary judgment in a complex case. The court agrees that it must be cautious in deciding to grant a motion for summary judgment. However, where the court is presented no proof indicating that a genuine issue of material fact exists, it has no choice but to grant summary judgment. Case law specifically places the burden on the plaintiffs to establish exposure to the defendant's product. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-28 (1986). Where there is a "complete failure of proof concerning an essential element of the nonmoving party's case[,]" all other facts are immaterial. *Id.* at 323.

The New Jersey Appellate Division in *Sholtis v. American Cyanamid Co.*, 238 N.J. Super. 8 (App. Div. 1989), held that a plaintiff could defeat a motion for summary judgment only by proving that he was exposed to the defendant's friable asbestos, frequently and regularly, while in close proximity and by offering competent proof, usually supplied by an expert, to establish a nexus between the defendant's product and the plaintiff's injuries. *Id.* at 31. Plaintiffs have proffered no such proof which they could produce at trial to demonstrate that the asbestos contained in the filter pads caused their injuries.

For the foregoing reasons,

It is on this 4th day of December, 1990,

ORDERED that plaintiffs' motion for reargument be and is hereby denied; and it is

FURTHER ORDERED that the remaining claims of the plaintiffs be and are hereby dismissed for the reasons set forth by this court on October 19, 1990.

Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY IN CIVIL ACTION NO. 86-03324 BY HON. GARRETT E. BROWN, JR. FILED OCTOBER 19, 1990

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 86-3324 (GEB)

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, *et al.*,

Plaintiffs,

JOHN DOE I, *et al.*,

and

E.I. DU PONT DE NEMOURS & CO.

Defendant/Third Party-Plaintiff

SCOTT LABORATORIES, INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third-Party Defendants

MEMORANDUM AND ORDER

BROWN, District Judge

This matter is before the Court on motions for summary judgment filed by defendant/third-party plaintiff E.I. du Pont de Nemours and Company ("Du Pont") seeking an order dismissing the claims of seven plaintiffs,[1] James Bradley, Arthur Bell, James Benson, Curtis Brown, Jr., Herman Brown, John Carew, John Collins and their spouses ("plaintiffs"), claiming that plaintiff have failed to establish the requisite causal connection between injuries they allegedly sustained and the material supplied to their employer by Du Pont; and by third-party defendants Scott Laboratories, Inc. ("Scott Inc."), Scott Laboratories, Ltd. ("Scott Ltd.") and Robert A. Keasbey Co. ("Keasbey"), seeking dismissal of Du Pont's third-party complaint and all crossclaims. For the following reasons, summary judgment is granted in favor of Du Pont and the remaining cross-motions for summary judgment are therefore moot.

FACTUAL BACKGROUND

Plaintiffs are former employees of Engelhard Industries ("Engelhard") and claim to have been injured by "certain material which contained asbestos" supplied by Du Pont to Engelhard during the period between 1970 and 1982. Plaintiffs' complaint asserts claims against Du Pont based on strict liability, intentional tort, breach of warranty, negligence, and negligent failure to warn. Plaintiffs also allege that they are entitled to future medical examinations and surveillance "by reason of their having been exposed to asbestos during the course of their employment." Plaintiffs' wives also allege loss of consortium.

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[1] Approximately fifty-five employees of Englehard Industries and their spouses brought this action. Seven of the plaintiffs have been selected to be "first-wave" plaintiffs and discovery has been completed as to them.

Appendix F

Du Pont denies liability, alleging that liability, if any, rests with defendants Scott Inc., Scott Ltd. and Keasbey. Scott Inc. and Scott Ltd. allegedly manufactured and sold the material supplied by Du Pont to Engelhard and Keasbey illegedly distributed other asbestos-containing insulation products to Engelhard. Du Pont further asserts that the only asbestos- containing materials it supplied to Engelhard were filter sheets used by Du Pont in its manufacturing operations in Memphis, Tennessee.

Scott Inc. is a California corporation that distributes filtration products to a variety of industries. It developed a series "F-30" filter sheets which contained approximately 10% asbestos. Du Pont allegedly began purchasing these filter sheets in 1970 for use in its Memphis, Tennessee plant's hydrogen peroxide manufacturing process. In 1980, Scott Ltd., a related Canadian company, assumed responsibility for their manufacture and sale and continued to market them until 1983.

In February 1983, Scott Ltd. informed Du Pont by letter that it was replacing the "F-30" series with a new "SD" series. Responding to Du Pont's inquiry, in June 1983, Scott Ltd. notified Du Pont that it replaced the "F-30" sheets with the new "SD" series to eliminate the 10% asbestos.[2] Du Pont then notified its employees of this. Tests revealed that asbestos levels during filter changes were at levels below the proposed and current OSHA standards.

Du Pont used Scott filter sheets from 1970 through 1983 a its Memphis plant. Du Pont used the "F" series filters to process hydrogen peroxide. The process involved hydrogenerating a solution of organic chemicals. Palladium acted as a catalyst in the process and accumulated on the filter sheets. The sheets were then removed, placed soaking wet in 55-gallon black steel drums and shipped to Engelhard for recovery of the metal. The weight of the material was spray-painted on the drums in yellow paint and the drums contained no other markings.[3] Each drum consisted of 60% organics and 40% solids by weight. The solid material included the Scott filter sheets which composed less than 7% of the weight and contained by weight less than 1% asbestos.

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[2] Du Pont was aware that the filter sheets contained asbestos prior to this date. Specifically, Scott's product brochure indicated that series "F" filter sheets contained asbestos. The filter sheets' labels, however, did not include a warning that they were made of asbestos.

Du Pont's Memphis plant delivered the "yellow label" drums to Engelhard's plant where it was chemically processed for the recovery of palladium. (Deposition of Eckstein at 31; Maples at 37-39). Engelhard's plant comprised some 32 separate buildings, (Defendants' Exh. H), of which only buildings 7, 16 and 18 ever came into contact with Du Pont's "yellow label" drums. (Deposition of Santangelo at 84-90; Eckstein at 64-68). The incoming drums were sealed and stored in building 16 and from there were brought to building 7 for incineration. Prior to incineration, the drums were opened and the contents emptied into large pans. (Deposition of Santangelo at 88). The contents consisted of "wet sludge" and carbon and generated no dust according to Engelhard's production managers. (Deposition of Santangelo at 89-90; Eckstein at 64-65). The contents were incinerated for one day and the furnaces reached the temperature of 1,550 degrees. (Defendants' Exh. I). The remaining material went to another portion of building 7, (Deposition of Eckstein at 65-66), and from there to building 18 where it was put back into the drums.

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[3] Du Pont and Engelhard refer to these drums as "yellow label" material.

Engelhard manufactured other asbestos-containing products at its Newark plant. According to plaintiff James Bradley, "Coleman" heaters were manufactured adjacent to building 1 and Harry Wenk testified that the operation was performed in building 11. When the operations at the Newark plant were phased cut, Engelhard hired environmental consultants who determined that nearly every piece of equipment in the plant was insulated with asbestos. (Deposition of Natale at 78-79). According to Engelhard's superintendent, Keasbey was a main supplier and installer of the asbestos products found in the plant.

In June 1983 after receiving Scott Ltd.'s letter, Du Pont notified Engelhard that it was recalling all "yellow label" catalysts because the filter sheets were made of 10% asbestos. Engelhard did not receive any "yellow label" drums after 1982. Thereafter, in June 1984, Du Pont informed Engelhard's new management about the issue. In August, Engelhard sent all its employees a letter advising them that the Du Pont material sent between 1971 and 1982 contained some asbestos. (Defendants' Exh M). The letter also recommended that all employees be tested for possible side effects. This lawsuit followed.

DISCUSSION

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the nonmoving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Fed. R. Civ. P. 56(e) also requires that when a nonmoving party bears the burden of proof at trial as to a dispositive issue, that party is required to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324. For an issue of fact to be genuine, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita*, 475 U.S. at 586. Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Du Pont moves for summary judgment dismissing with prejudice all claims asserted by the seven "first wave" plaintiffs. Du Pont contends that plaintiffs have failed to establish the requisite causal connection between the injuries they allegedly sustained and the asbestos-containing material supplied to Engelhard by Du Pont.[4]

It is axiomatic that a "plaintiff must prove tortious conduct, injury and proximate cause" to prevail in a tort case. *Ayers v. Jackson Twp.*, 106 N.J. 557, 585 (1987); W. Keeton, D. Dobbs, R. Keeton & D. Owen., Prosser & Keeton on the Law of Torts § 30, at 164-65 (1984). Proof of causation mandates that a plaintiff establish a sufficient nexus between the plaintiff's injury and the defendant's conduct. *Ayers*, 106 N.J. at 585. Fed. R. Civ. P. 56(c) commands summary judgment, after adequate time for discovery, in favor of a defendant where a plaintiff fails to establish that he was sufficiently exposed to the defendant's product. *See Celotex*, 477 U.S. at 322-28.

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[4] The strict liability and claims for medical surveillance, emotional distress and punitive damages will be discussed separately.

Du Pont argues that plaintiffs have failed to meet their burden. Du Pont first contends that plaintiffs failed to identify its "yellow label" material as a substance to which they were exposed. Second, Du Pont contends that even if plaintiffs had been exposed to Du Pont's "yellow label" material, they have failed to show regular and frequent exposure while in close proximity. Plaintiffs, in opposition, argue that they had a great deal of exposure to the asbestos-containing material supplied by Du Pont. Plaintiffs further contend that they were exposed on a frequent basis or worked in close proximity to buildings 7 and 18 which they claim emitted smoke, fumes, dust and soot which settled on individuals and objects.

Plaintiffs aver that Du Pont has not presented affidavits or evidence from any source other than their own depositions which indicates that there was insufficient exposure. On this basis, plaintiffs claim that Du Pont's motion should be denied. Plaintiffs misstate the law. In *Celotex*, the Supreme Court found that Rule 56 does not require "that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex*, 477 U.S. at 323 (emphasis in original). Rule 56 merely requires that the moving party demonstrate an absence of a genuine issue of material fact. *Id.* The burden then shifts to the nonmoving party to set forth specific facts disclosing that a genuine issue for trial exists. *Id.*

The first issue the court must address is Du Pont's motion to strike plaintiffs' affidavits. Fed. R. Civ. P. 56(c) provides that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein" General Rule 27(A) of the Local Rules for the United States District Court for the District of New Jersey is similar. Trial courts are precluded from considering affidavits that fail to comply with the rules. *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 282-83 (3d Cir. 1988).

In *Lujan v. National Wildlife Federation,* 110 S. Ct. 3177 (1990), the Supreme Court stated that summary judgment shall be entered unless the affidavits set forth specific facts showing that a genuine issue for trial exists. Further, it noted that rule 56(e) was "not meant to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Id.* at 3158. Thus, where affidavits merely repeat conclusory allegations included in the complaint, they are not sufficient to defeat a motion for summary judgment. *Id.*

It is this court's opinion that plaintiffs' affidavits contain only vague and conclusory allegations and are not based on personal knowledge.[5] None of the affidavits allege personal knowledge of whether the Du Pont "yellow label" material was in fact being incinerated while they were working in the vicinity, nor do they allege that the smoke, dust, soot and ash contained asbestos fibers — the alleged cause of their injuries. For example, Herman Brown avers in his affidavit that he was exposed to asbestos from Du Pont's "yellow label" material because the smoke stacks above buildings 7 and 18 emitted fumes. (¶7). Yet he admitted that he never worked in buildings 7 and 18 where the Du Pont material was incinerated (¶4) nor does he allege personal knowledge of whether those emissions occurred while Du Pont material was being incinerated.

Additionally, some of plaintiffs' affidavits directly contradict their prior sworn testimony. For example, in his affidavit, James Bradley swears that he was exposed to Du Pont's, "yellow label" material because he spent a lot of time in or near buildings 7 or 18, (¶¶17-18) yet he admitted on deposition that he never worked in those buildings. (Defendants' Exh. S). He further alleges that he was exposed to the asbestos in buildings 4 and 14 but the testimony has established that Du Pont's "yellow label" material was never processed in those buildings. (Deposition of Santangelo at 73). Plaintiffs have offered no explanation for their contradictory statements. Consequently, the court must disregard plaintiffs' affidavits for purposes of determining whether there is a material dispute of fact. *See Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705-0 (3d Cir. 1988) (purpose of summary judgment would be seriously impaired if the district court were not free to disregard a conflicting affidavit).

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[5] All plaintiffs, except James Benson, filed an affidavit.

Plaintiffs bear the burden of proof at trial to demonstrate that Du Pont's "yellow label" material caused their injuries. *Ayers*, 106 N.J. at 585. In *Sholtis v..American Cyanamid Co.*, 238 N.J. Super 8 (App. Div. 1989), the New Jersey Superior Court, Appellate Division, announced the standard to be applied in a toxic tort case. It adopted the "frequency, regularity and proximity" test first embraced in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986). In *Sholtis*, the court held that plaintiffs could defeat a summary judgment motion only by proving that they were exposed to the defendant manufacturers' friable asbestos, frequently and regularly, while in close proximity and by offering competent proof, usually supplied by an expert, to establish a nexus between the defendant's product and the plaintiff's injuries.[6] *Id.* at 31. Friable material is defined as material that actually releases asbestos fibers into the air. *Id.* at 13 n.2.

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[6] These requirements are in addition to the other elements of a products-liability action.

Scott Inc.'s expert, Dr. Brian E. Pape, P.h.D., testified that no asbestos could have been released from the filter sheets before incineration; and that any asbestos fibers were totally destroyed through the incineration process. (Defendant's Exh. O). Dr. Clifton C. Bergeron, expert witness for Du Pont, corroborated Dr. Pape's opinion, positing that "after incineration in Engelhard's furnaces, the residual material contained no asbestos." (Defendant's Exh. P).

Plaintiffs have not set forth sufficient proof that the asbestos contained in the "yellow label" drums was actually released into the air, nor have they contradicted the expert testimony presented on behalf of Du Pont. During oral argument, counsel for plaintiffs argued that the definition of asbestos in Websters Dictionary indicated that it is indestructible[7] and therefore the expert testimony was incredible. This is not sufficient to defeat a motion for summary judgment. The expert testimony reveals that it is impossible for asbestos fibers to become airborne when incinerated above 1250 degrees. The evidence also indicates that the asbestos was incinerated at 1550 degrees. Plaintiffs have not offered any proof other than its reliance on a definition in opposition to this testimony. Clearly, this is insufficient to defeat a motion for summary judgment.

In opposing the motion for summary judgment, plaintiffs' offer a supplemental report (Plaintiffs' Exh. G)[8] written by plaintiffs' expert, Dr. Joseph Aaron, and seven initial medical reports of the plaintiffs produced by Dr. Aaron (Plaintiffs' Exh. E). Dr. Aaron is an internist who is not board certified in pulmonary medicine or in any other field. (Aaron 6-7, 10). In his initial medical reports, Dr. Aaron opines that each plaintiff's "pulmonary condition is the result of his exposure to chemical fumes, dust, and asbestos in his work at Engelhard.' (Defendant's Exh. Q). This opinion was based on his assumption that plaintiffs were frequently "exposed to breathing in asbestos over a considerable period of time [a few years] over the course of their employment." (Aaron 76-77). Dr. Aaron further stated that he could not say with medical certainty that plaintiffs' conditions were related to exposure from the "yellow label" material that Du Pont supplied to Engelhard. (Aaron 96). Finally, Dr. Aaron concluded that if it was impossible for the asbestos fibers to become airborne, a fact of which he did not know, then the asbestos that was supplied by Du Pont to Engelhard could not have been the cause of plaintiffs' injuries (Aaron 116).

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[7] Asbestos is defined as "a mineral (as chrysotile, tremolite, or actinolite) that readily separates into long flexible fibers suitable for uses where incombustible, nonconducting, or chemically resistant material is required." Webster's Third New International Dictionary 126 (1976).

> In his supplemental report, Dr. Aaron opines that the exposure to asbestos was a contributing cause, of some significance, to the development of the pulmonary conditions which I found with respect to those patients. This opinion, of course, will depend on the facts given to me with respect to

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[8] Du Pont raises the question of whether this court should consider the supplemental report received by this court on September 10, 1990. The court has discretion in deciding whether to admit supplemental affidavits which are submitted in a summary judgment motion. *Sholtis*, 238 N.J. Super. at 17. Because the court finds no prejudice to the defendants, it will consider the supplemental report.

> the exposure of any particular individual to asbestos, with respect to the length, intensity and duration of exposure.[9]

(Plaintiffs' Exh. G). Dr. Aaron goes on to say that his opinion is "based upon the facts given to him concerning the general asbestos exposure at the plant site" and that the incinerated asbestos became airborne and that plaintiffs were frequently and intensely exposed to the asbestos more than just occasionally. (Plaintiffs' Exh. G). Dr. Aaron, however, does not refute Du Pont's expert testimony that it was impossible for the asbestos to become airborne and that plaintiffs have not alleged that they were frequently exposed to the "yellow label" material.

Plaintiffs only argument is that "[a]t the time of trial it will be the obligation of the plaintiffs, and it will be in their interest in connection with this case, to describe fully their contact at

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[9] Du Pont argues that Dr. Aaron's supplemental report is a "net opinion" which the New Jersey courts have ruled inadmissible. It cites in support *Landrigan v. Celotex*, A-5064-88T1, slip. op. (N.J. App. Div., September 4, 1990). In *Landrigan*, the appellate division noted that a "net opinion" is one that is based on an expert's bare conclusions and is unsupported by factual evidence. *Landrigan*, slip. op. at 3. When seeking to establish a cause and effect relationship, an expert's opinion must rely on supporting data and a factual basis. *Id.* (quoting *Rubanick v. Witco Chem. Co.*, 242 N.J. Super. 36, 49 (App. Div. 1990)). Otherwise, it is inadmissible. *Id.* Here, Dr. Aaron's opinion is based on the assumption that plaintiffs were exposed to asbestos. (Plaintiffs' Exh. C). This assumption however has already been established as inaccurate by the expert testimony. *See* Defendant's Exhs. O & P. Although Dr. Aaron concedes that his opinion depends on facts that will be given to him at trial, (Plaintiffs' Exh. C), this is not sufficient to defeat summary judgment. *Garside*, 895 F.2d at 49; *Sholtis*, 238 N.J. Super. at 31.

Delancy Street with and in the buildings where the Du Pont asbestos was being incinerated, and their contact and exposure in areas affected by the burning asbestos . . . " Plaintiffs Brief at 7. Plaintiffs argument is not persuasive. "[A] mere promise to produce admissible evidence at trial does not suffice to thwart the summary judgment ax," *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990). Moreover, plaintiffs have not gone beyond the pleadings nor have they designated specific facts showing that a genuine issue for trial exists.

Accordingly, because plaintiffs' own expert admits that the alleged pulmonary conditions could not have been caused by Du Pont's "yellow label" material if the asbestos fibers were not airborne and because plaintiffs have not contradicted the testimony of Dr. Pape and Dr. Bergeron that it was impossible for the asbestos fibers to become airborne after incineration, summary judgment is entered in favor of Du Pont.[10]

Plaintiffs contend that Du Pont's summary judgment motion is directed to only one of the plaintiffs' four major claims for damages. Accordingly, plaintiffs argue that they are entitled to pursue claims for emotional distress, medical surveillance, and punitive damages even if they fail to establish that Du Pont is liable for those injuries or that they in fact suffer from asbestos-related diseases. The court finds no merit in this argument. In support plaintiffs cite *Mauro v. Raymark Indus., Inc.*, 116 N.J. 126 (1989), *Ayers v. Jackson*, 106 N.J. 557 (1987) and *Devlin v. Johns-Manville Corp.*, 202 N.J. Super. 556 (Law. Div. 1985).

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[10] Because the court finds that plaintiffs have not set forth an essential element of their claim against Du Pont, the summary judgment motions of Scott Inc., Scott Ltd. and Keasbey are rendered moot.

These cases stand for the proposition that a plaintiff may recover on these types of claims when there is proof, established through expert testimony predicated upon the significance and extent of exposure to the asbestos, the seriousness of plaintiff's diseases and the like. Here, the court has no such testimony. Accordingly, summary judgment is proper.

Finally, plaintiffs' claims for strict liability must also fail. The doctrine of strict liability is premised on the notion that one engaged in the business of selling a product impliedly represents that the goods which are placed in the stream of commerce are free form defect. Restatement (Second) of Torts § 402A (1965). Comment f states that the rule applies only to those engaged in the business of selling products for use or consumption.

Here, Du Pont was not engaged in the business of selling filter sheets, nor was it engaged in the business of supplying them. Du Pont bought the filter sheets from third-party defendants Scott Inc. and Scott Ltd. It did not sell the filters to Engelhard. It purchased Engelhard's services in order to recover palladium. It was essentially a service agreement. (Defendant's Exh. G). Although this is a regular business, it is not the type of business to which the doctrine of strict liability applies. *See Santiago v. E.W. Bliss Div.*, 201 N.J. Super 205, 217-23 (App. Div. 1985) (seller of punch press not strictly liable for injury caused by removal of safety guard when it was not engaged in the business of designing removed safety guard); *Allen v. Nicole, Inc.*, 172 N.J. Super. 442 (Law. Div. 1980) (one may not be viewed as a seller if it is the use of the (one may not be viewed as a seller if it is the use of the equipment which constitutes his business). Du Pont was engaged in the business of buying filter sheets, not selling them.

Summary judgment is therefore appropriate in favor of Du Pont on plaintiffs' strict liability claims. Plaintiffs' claims for breach of express and implied warranties are encompassed within the strict liability claim, *see Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 345 (1974), and are disposed of accordingly.

For the foregoing reasons, it is ORDERED this 19th day of October, 1990, that Du Pont's motion for summary judgment as to all claims by the above seven "first wave" plaintiffs and their spouses be and is hereby granted; and it is

FURTHER ORDERED that the cross-motions for summary judgment on behalf of Scott Inc., Scott Ltd., and Keasbey are dismissed as moot; and it is

FURTHER ORDERED that the remaining plaintiffs show cause in writing on or before November 1, 1990 why their claims should not be dismissed for the reasons set forth in this memorandum and order.

s/Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

APPENDIX G — PLAINTIFFS' NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 18, 1991

MARGOLIS & GORDON
485 Morris Avenue
Springfield, New Jersey 07081
(201) 467-5820
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 86-3324
(Hon. Garrett E. Brown, Jr.)

NOTICE OF APPEAL

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, *et al.*,

Plaintiffs,

vs.

JOHN DOE, *et al.*,

Defendants.

-and-

E.I. DU PONT DE NEMOURS & COMPANY,

Defendant/Third-Party Plaintiff,

Appendix G

vs.

SCOTT LABORATORIES, INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third Party Defendants.

NOTICE is hereby given that the plaintiffs hereby appeal to the United States Court of Appeals for the Third Circuit from the Memorandum and Order of the District Court dated February 21, 1991, which effectively served as a "final decision" of dismissal with prejudice as to all claims of the plaintiffs under 28 U.S.C. Sec. 1291 and Fed. R. Civ. P. 54(b).

TAKE FURTHER NOTICE that the plaintiffs intend to include in this appeal the previous Memoranda and Orders of the District Court dated October 19, 1990 and December 4, 1990 which addressed the claims of some, but not all of the plaintiffs in this case.

MARGOLIS & GORDON
Attorneys for Plaintiffs

s/ Marc J. Gordon
MARC J. GORDON

DATED: March 14, 1991

APPENDIX H — PLAINTIFFS' AFFIDAVITS

John Carew Dated September 7, 1990

MARGOLIS & GORDON
485 Morris Avenue
Springfield, New Jersey 07081
(201) 467-5820
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 86-3324 (GEB)

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, *et al.*,

Plaintiffs,

vs.

JOHN DOE I, *et als.*,

Defendants.,

-and-

E.I. DU PONT DE NEMOURS & COMPANY, a corporation of the State of Delaware,

Defendant-Third
Party Plaintiff,

vs.

Appendix H

SCOTT LABORATORIES, INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third Party Defendants.

AFFIDAVIT

STATE OF NEW JERSEY) SS:
COUNTY OF UNION)

JOHN CAREW, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I was formerly employed by Englehard Industries in Newark, New Jersey, and worked at the Delancy Street location from at least 1972 until after 1983. I am making this Affidavit in connection with the claim that I have made against the DuPont Company because of being advised that between 1970 and 1983 that company sent material containing asbestos to Englehard for the purpose of refining and incineration, in order to reclaim palladium.

2. I have been advised that most of that activity took place in Buildings 7 and 18, and I spent a great deal of time in both of those buildings from 1972 through 1983 as an Englehard employee.

3. I am aware of the fact that in Buildings 7 and 18 material from DuPont was regularly processed and refined and incinerated.

4. The atmospheric conditions in the air within those two buildings was very,very heavily polluted with smoke and dust.

Appendix H

5. This smoke and dust came from the burning operation, primarily.

6. There were smoke stacks in the buildings and dust and fumes and smoke would not only leak out of the oven and furnace doors, but would also go up in the stacks and be airborne outside as well as inside the building.

7. The material coming out of the stacks was a very heavy noticeable and frequently black ash-type material which would settle all over the immediate area including on objects and individuals.

8. Everything on the Englehard site was affected by this heavy smoke and dust from the furnaces.

9. Examples of how heavy the pollution was are that on occasions cars that were parked nearby were damaged, and houses nearby would also be damaged, and to the best of my understanding it was common knowledge that Englehard, from time to time, paid for the repainting of cars and the painting of homes and perhaps other buildings nearby.

10. Over the course of time there were many complaints by neighbors concerning the air pollution caused by the material coming out of the smoke stacks.

11. I suffer from lung disability and I have been advised that it is the type of lung disability that can be caused by exposure to asbestos.

12. My job at Engelhard from the early seventies at the latest, until past 1983 was in maintenance, and I was assigned in general

mostly to work in the refining area which included Buildings 7 and 18, so that I was in the general area, outside as well as inside Buildings 7 and 18 for a large part of my time with Engelhard.

13. Through all those years, while I was not standing right in front of the furnaces for eight hours a day, five days a week, I was in and out of those buildings and near those buildings on a regular and frequent basis.

14. I am aware that DuPont claims that I was exposed to asbestos at work other than that which was contained in the DuPont product being incinerated.

15. It is correct that as a maintenance employee I did work with asbestos insulation from time to time, but the overwhelming majority of my work had to do with working on equipment and machinery where there was no asbestos involved.

16. When I did work with asbestos, there would be some dust created, but I was aware of the fact that I was working with asbestos on those occasions.

17. As a result of being advised by Engelhard in August of 1984 that asbestos-containing material from DuPont had been processed for 13 years in Buildings 7 and 18, I became quite concerned.

18. I am and have been aware of the fact that asbestos can be very harmful to my health, and can cause lung disability (which I have) and can lead to the development of cancer both in the lungs and in other parts of the body.

19. I am very concerned, upset and nervous about this because

of the fact I know many people who have developed cancer including personal friends, and a lot of people who worked with me at Englehard.

20. I am aware of the fact that there are a significant number of people who worked in or near Buildings 7 and 18 with some degree of regularity who have developed cancer, including some individuals who are involved with me in this law suit.

21. I am also disturbed and angry about the fact that DuPont never advised my employer, and to this day has never advised *me* directly about the fact that it was exposing me to the burning of asbestos.

22. I feel that if I had known that I was being exposed to asbestos on as regular and constant a basis as I was, I would have been able to make a choice avoiding the exposure entirely in various ways, using protective breathing apparatus more frequently, or even changing jobs so as not to work on a regular basis around asbestos.

23. In general, I can describe the atmosphere around the incineration process as being very much more dusty and dirty than any exposure that I had to any asbestos while I was handling it personally.

24. While there was asbestos elsewhere in the Engelhard plant, such as on pipes as insulation and on vessels, that insulation was not in a bad condition or state of repair so that the asbestos almost completely bound up and covered, and did not flake off or become airborne in any way except in infrequent and isolated cases.

25. When that did happen it was usually repaired rather promptly.

26. I recall that particularly in Building 7, the exposure to dust and fumes and smoke from the furnaces was so intense that the employees were working there would have to leave the building.

27. My recollection is that in Building 7 and 18 all of the DuPont material was processed, and in Building 18 they had a press which was called the "Dupont press"

28. I understand that DuPont claims that based upon the deposition which I gave earlier in this case it believes that I was only occasionally or seldom exposed to the burning of the DuPont material in Buildings 7 or 18.

29. That is not correct, and I recall being in those buildings and near those buildings, and subject to the settling of the burned ash for a significant period of my time spent at Delancy Street.

s/ John Carew
JOHN CAREW

Sworn and Subscribed to
before me this 7th day of
September, 1990.

s/Antoinette Thomas
Antoinette Thomas
Notary Public of New Jersey
My Commission Expires Feb. 27, 1994

Appendix H

Herman Brown Dated September 8, 1990

MARGOLIS & GORDON
485 Morris Avenue
Springfield, New Jersey 07081
(201) 467-5820
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 86-3324 (GEB)

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, et al.,

Plaintiffs,

vs.

JOHN DOE I, et als.,

Defendants.,

and

E.I. DU PONT DE NEMOURS & COMPANY, a corporation of the State of Delaware,

Defendant-Third
Party Plaintiff,

vs.

Appendix H

SCOTT LABORATORIES, INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third Party Defendants.

AFFIDAVIT

STATE OF NEW JERSEY) SS:
COUNTY OF UNION)

HERMAN BROWN, of full age, being duly sworn according to law, upon his oath deposes and says;

1. I am a former employee of Engelhard Industries and; worked at the Delancy Street location from approximately 1972 past the year 1983.

2. I suffer from lung disability, and in August of 1984 I was advised by my employer that between 1971 and 1982 the DuPont Company sent to Engelhard for refining material which contained asbestos.

3. I have been informed that that material was processed in Buildings 7 and 18, which did contain DuPont material.

4. While I was not assigned to work directly inside Building 7 or Building 18, I worked near and around those buildings very often performing clean up work.

5. I remember that the atmosphere in those buildings was always very dusty and dirty because of the burning operation of the furnaces, which caused dust fumes and smoke to fill the rooms.

6. I remember many times when the employees in those buildings would have to come out of them because there was so much dust, fumes and smoke.

7. There were smoke stacks on Buildings 7 and 18, and there was always a lot of smoke, dust and black substances like ash coming out of the smoke stacks.

8. When I worked near those buildings, and even some distance away from them elsewhere on the plant site, I could smell the fumes and smoke from the burning in those buildings.

9. What came out of the stacks on those buildings would get all over the surrounding objects including automobiles and even the land and buildings owned by neighbors.

10. The smoke and dust coming from the smoke stacks would fall to the ground and settle on various objects near Buildings 7 and 18, as well as in other areas of the Engelhard site.

11. In August of 1984 I was advised by Russell Oiler by means of receiving a letter that some of the material that was burned and otherwise refined in Buildings 7 and 18 contained asbestos.

12. I understand that asbestos can cause cancer, and I am concerned about the possibility of becoming seriously ill with that disease because of the exposure that I had to asbestos.

13. From my observation any of the employees that were regularly or more than occasionally working in or near Buildings 7 and 18, experienced a lot of exposure to the dust, fumes and smoke from the burning that went on in those buildings.

14. I did clean-up work as part of my job duties, and I imagine that some of the material that I cleaned up from the floor or ground was asbestos which had been removed from pipes or other equipment by maintenance employees.

15. I do not recall any particular large amount of asbestos at any time as waste, and I do not recall that any asbestos on equipment or pipes was in place on a damaged condition

16.I believe that any exposure that I may have had to asbestos and any dust created by it was far less strong compared to the amount of dust, fumes and smoke that came from the operations in Buildings 7 and 18 to which I was exposed on a fairly regular basis.

s/Herman Brown
HERMAN BROWN

Sworn and Subscribed to
before me this 8th day of
September, 1990.

s/Barbara B. Lipkin
Barbara B. Lipkin
My Commission Expires
October 13, 1990

Appendix H

Curtis Brown Dated September 8, 1990

MARGOLIS & GORDON
485 Morris Avenue
Springfield, New Jersey 07081
(201) 467-5820
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 86-3324 (GEB)

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, et al.,

Plaintiffs,

vs.

JOHN DOE I, et als.,

Defendants.,

-and-

E.I. DU PONT DE NEMOURS & COMPANY, a corporation of the State of Delaware,

Defendant-Third
Party Plaintiff,

vs.

Appendix H

SCOTT LABORATORIES, INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third Party Defendants.

AFFIDAVIT

STATE OF NEW JERSEY) SS:
COUNTY OF UNION)

CURTIS BROWN, of full age/ being duly sworn according to law, upon his oath deposes and says.:

1. I am one of the plaintiffs in the case against du Pont, having been employed at Engelhard Industries at its Delancy Street plant during part of the time period between 1970 and 1983.

2. We have now been advised that the du Pont Company has informed Engelhard that for 13 years the material which du Pont sent from its Memphis plant to Engelhard for refining, primarily for burning, contained asbestos.

3. I am informed that that material was processed in buildings 7 and 18.

4. I therefore was exposed to the dust, fumes, smoke, and soot that was created by the processing and the inceneration of the du Pont product, since I was present in those buildings for much of the time, particularly during the years 1976 and 1982.

5. I am informed that du Pont is claiming in this case the exposure that I had to the du Pont product was insignificant in terms of supporting my claim in this case.

6. My claim in this case is not limited to the question of lung disability resulting from exposure to asbestos, but also includes a very great concern that I have for my health because of my being exposed to asbestos.

7. I am aware that asbestos can cause serious health problems, and since I do have at least one condition that can be the result of exposure to asbestos, namely a lung condition, I feel that I have been misled and deceived by not having been informed as to exactly what I was exposed to.

8. I have also been advised that it is medically indicated that I should have periodic checkups so as to detect the development of any serious disease such as cancer.

9. I feel that I was exposed very intensely to a lot of dust, fumes and smoke which came from some of the burning that apparently involved the asbestos from du Pont in Memphis.

10. The burning operation in buildings 7 and 18 was very dusty, dirty and smokey and involved those substances coming out of the doors of the building, filling up the rooms, and going out of the smokestacks on to everything in the area, not only confined to the Engelhard location.

11. During the course of my employment I saw many containers with the name du Pont on them although I cannot state which of those containers came from Memphis, and I am accepting du Pont's word that some of those did in fact come from Memphis and did contain material that was made up of asbestos.

Appendix H

12. Since the burning of the du Pont material took many hours, the dust, fumes and smoke to which I was exposed was significant over the course of several years.

13. The contact that I had with the dust, fumes, and smoke from the incineration process as well as other elements of the refining process was not just occasional, once every so often, or very slight such as might occur if someone is just passing by a particular area.

14. My employment at Engelhard involved being in and near buildings and areas where the refining and incineration process took place.

s/ Curtis Brown
CURTIS BROWN

Sworn and Subscribed to
before me this 8th day of
September, 1990.

s/Barbara B. Lipkin
Barbara B. Lipkin
My Commision Expires
October 13, 1990

Appendix H

James Bradley Dated September 8, 1990

MARGOLIS & GORDON
485 Morris Avenue
Springfield, New Jersey 07081
(201) 467-5820
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 86-3324 (GEB)

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, et al.,

Plaintiff,

vs.

JOHN DOE I, et als.,

Defendants.,

and

E.I. DU PONT DE NEMOURS & COMPANY, a corporation of the State of Delaware,

Defendant-Third
Party Plaintiff,

vs.

SCOTT LABORATORIES INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third Party Defendants.

AFFIDAVIT

STATE OF NEW JERSEY) SS:
COUNTY OF UNION)

JAMES BRADLEY, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I was a chemical operator at Engelhard Industries at its Delancy Street location during the periods of 1970 to 1983, when, as I have been advised, the DuPont Company sent to Engelhard Industries for refining, including incineration, material from, its Memphis, Tennessee plant, which contained asbestos.

2. I was advised by my employer in 1984 that it was recommended that I be examined because my job duties brought me into contact with the DuPont material which was processed essentially in Buildings 7 and 18.

3. I in fact do have a lung condition for which my major complaint is coughing, as well as shortness of breath and chest pain.

4. I am advised that these complaints can be the result of exposure to lung irritants, including asbestos.

5. Because of the fact that I am very much aware of the harmful effects that asbestos can have on the human body,

including the development of lung problems as well as lung cancer and other types of cancer, I have been very depressed and concerned about learning of the exposure during the 13 years since 1970.

6. I am aware of the fact that asbestos-related disease does not always develop right away, and that there is a period of incubation or latency, so I cannot be reasonably certain that I will not develop the same kind of disease, including cancer that many other co-employees have already developed, including some people who are plaintiffs in this law suit.

7. I know of a large number of people who in fact have died because of cancer, and the large number seems to be very out of proportion to what would normally be expected.

8. I understand that in this case, in defense again, my claim, DuPont claims that because I was never assigned to Buildings 7 and 18 so as to work inside them on a regular basis, I did not have enough exposure to asbestos to be harmful, meaningful, potentially dangerous, or to have contributed to my lung condition.

9. I disagree entirely with that claim, since the results of the burning of the DuPont materials in Buildings 7 and 18 were visited upon individuals who were not actually inside the building.

10. The dust, fumes and smoke that came from those buildings through smoke stacks, and through open doorways was extremely intense.

11. The smoke, dust, fumes and soot came out of the furnaces, particularly in Building 7, and went right out of the doorways of the building into the general atmosphere.

12. The general atmosphere around the smoke stacks was such that everything including individuals, objects, cars and land and property of adjoining and distant neighbors was covered with the dirt, dust and smoke.

13. The results of the incineration and burning could be smelled and experienced by everyone nearby Buildings 7 and 18, elsewhere on the Engelhard site, and off the property.

14. I remember particularly the occasions when the furnaces would be shut down and I personally was involved in at least one of those occasions.

15. The purpose of the shutdown was because they were creating so much smoke and fumes.

16. I remember complaints from people outside of the Engelhard site, such as Conrail, trucking companies, and the City of Newark, with respect to the smoke pollution that was caused.

17. Because of my position as a union official, I spent a lot of time in various locations in the plant where I was not assigned to work, including Buildings 7 and 18, and the general refining area of the Engelhard plant site which included those buildings.

18. Any suggestion that I had only limited contact, every so often, in or near Buildings 7 and 18 involving the incineration process, is completely incorrect.

19. In addition to being depressed and concerned about the potential development of serious disease, I also am upset and angered to think that the DuPont Company had deliberately concealed from me as well as from other employers the fact that

it was exposing us a very harmful substance.

20. Had I known that I was going to be exposed to the burning of asbestos over the course of time, I would have had the opportunity to protect myself as well as I could from the potentially harmful effects of the exposure, and the concealment of that fact by DuPont seems to me to be inexcusable.

s/James Bradley
JAMES BRADLEY

Sworn and Subscribed to
before me this 8th day
of September, 1990.

s/Barbara B. Lipkin
Barbara B. Lipkin
My Commission Expires
October 13, 1990

Appendix H

John Collins Dated September 8, 1990

MARGOLIS & GORDON
485 Morris Avenue
Springfield, New Jersey 07081
(201) 467-5820
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 86-3324 (GEB)

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, et al.,

Plaintiffs,

vs.

JOHN DOE I, et als.,

Defendants.,

-and-

E.I. DU PONT DE NEMOURS & COMPANY, a corporation of the State of Delaware,

Defendant-Third
Party Plaintiff,

SCOTT LABORATORIES, INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third Party Defendants.

AFFIDAVIT

STATE OF NEW JERSEY) SS:
COUNTY OF UNION)

JOHN COLLINS, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I was employed at the Delancy Street location of Engelhard Industries during the entire period involved in this law suit, namely 1970 through 1983.

2. During those years I was involved in a very great deal of exposure to the waste material coming from buildings 7 and 18.

3. In both of those buildings there were furnaces which involved the incineration of material sent to Engelhard Industries from the du Pont Company.

4. The du Pont material arrived in 55 gallon steel drums and was loaded in to large pans and put into the furnaces for burning.

5. The smoke, dust and fumes coming from those furnaces and going into the buildings themselves was so great as to be almost not describable.

6. It should be sufficient to note that the dust, fumes and smoke were so heavy that there were intense black clouds in the buildings and coming out of the buildings, and that frequently

the individuals in the buildings, particularly building No. 7 would actually have to leave the buildings.

7. I was a union official during this time, and I am aware of the innumerable complaints made by individual employees and the union regarding these working conditions.

8. The result of the incineration was dust, fumes, smoke, and soot that went up through the smokestacks from buildings 7 and 18, as well as all the dust, fumes, smoke and soot that remained in the buildings.

9. The material coming out of the smokestacks would go all over, including on to the nearby areas of the Engelhard plant site on Delancy Street as well as the entire plant site.

10. The material that came out of the stacks would go on to adjoining property and there were constantly complaints from different neighbors including a trucking company that was nearby, and the Conrail Company.

11. I recall that on many occasions there was damage to automobiles from the soot and dust, and it was common knowledge that Engelhard Industries paid for the repainting of those vehicles.

12. There were occasions when Engelhard Industries paid for the repainting of buildings owned by neighboring residents and/or businesses.

13. I can recall instances when the New Jersey State Police, and also the Newark Police would come to the plant site because

of complaints about the heavy smoke coming from buildings 7 and 18.

14. I can recall many occasions when the company was ordered to shut down the furnaces because of the heavy pollution.

15. I can recall instances when union officials at the plant complained to the company and requested and demanded that the furnaces be shut down because of the heavy pollution.

16. In August of 1984 I and hundreds of other Engelhard employees were advised by Engelhard that du Pont had just informed it that the material that du Pont had sent in for processing and refining had contained asbestos.

17. I am directly familiar with the du Pont activity.

18. du Pont material was burned in both buildings 7 and 18.

19. I am aware that the metal sought to be recovered on behalf of du Pont was palladium.

20. I know of no other company that sought to recover palladium in its dealings with Engelhard.

21. One of the items of equipment in building 18 was a "press", and that was called the "du Pont press".

22. All palladium recovery at Engelhard was on behalf of du Pont, and all du Pont reclaiming was for the purpose of reclaiming palladium.

23. In other words, I have no knowledge of other companies

seeking to recover palladium, and no knowledge of du Pont's seeking to recover other precious metal aside from palladium.

24. I was directly exposed in building 18 to the dust, fumes and smoke from the refining of du Pont materials when I was assigned to work there.

25. However, because of my activities as a union official, and my being close to building 7, as well as being in the general area of the smokestacks, I was constantly exposed to the results of the refining and incineration process of the du Pont material.

26. In that regard, I may have had more regular, direct, extended, and intense exposure than some of the other plaintiffs in this case, including Herman Brown, Curtis Brown, Arthur Bell, John Carew, James Bradley and James Benson, but from my observation, all of those individuals, from time to time and over some extended period of time were exposed to the dust, fumes, and smoke resulting from the refining, reclaiming, and incinerating of the du Pont material.

27. It is my understanding that there was du Pont material that was processed at Engelhard which did not come from the du Pont Memphis, Tennessee plant.

28. It was not until being advised in August of 1984 about the fact that the material coming from the du Pont Memphis plant contained asbestos that I learned that in fact asbestos had been processed, including being incinerated, between the years 1971 and 1982.

29. I have been informed that since this law suit was started, the period of time was extended to 1970 to 1983, insofar as the

processing of du Pont material is concerned.

30. I have also been advised that the union has been informed that close to one million pounds of material was processed over the course of these 13 years.

31. While I was and am aware of the fact that where we were working involved the use of chemicals, it was a complete shock for me to learn that for 13 years I had been closely exposed to asbestos in a harmful form, and this shock was increased by the fact that the warning came from the source of the asbestos, the du Pont Company, as well as from Engelhard Industries.

32. The fact that I was notified and warned to be examined clearly indicates to me that I was put at risk of damage to my health for a period of 13 years.

33. I am aware that asbestos is a very harmful and dangerous material, causing many physical problems, not only involving one's lungs, but also the development of cancer.

34. I know that I have lung disease, but almost more importantly, I am aware of the very high risk of developing cancer.

35. I have been very nervous, depressed and upset about this risk to my health since I learned of it in August of 1984.

36. I have had the unfortunate experience of seeing my concern take a definite form in the example of an individual named John Gowans who was my wife's brother.

37. John Gowans worked in the same area at Engelhard that I did during the time periods between 1970 and 1980, and was

also exposed intensely to the activity involving the refining and reclaiming of du Pont material.

38. John developed throat cancer early in 1990 and died as a result of that disease several months ago.

39. It is almost beyond description for me to try to express my feelings regarding the fact that my worst fears were actually realized with respect to a very close friend and member of my family.

40. I am aware that asbestos increases the risk of cancer of the throat, and in the case of John Gowans it was his larynx that was the site of the cancer.

41. I am aware that since this case started, in addition to what happened to my brothrr-in-law, John Gowans, another plaintiff, Lawrence Veneiro, has developed cancer and died, and that another plaintiff, Vasil Vislocky, is now suffering from lung cancer.

42. I am also of course aware of the fact that before this law suit started Joe Pietropinto died of lung cancer.

43. All of these facts serve to confirm and increase my concern and fear about developing the disease.

44. I feel a sense of anger and outrage, as well as fear, because of the fact that the exposure of me as well as hundreds of other people by du Pont was intentional, and the concealment of the fact that there was a very harmful and poisonous substance took place over the course of years and that that concealment was deliberate.

45. I am aware that du Pont claims in this case that one or more of the individual plaintiffs had exposure to its burning product that was insignificant.

46. That is simply not true with respect to me and with respect to any of the individuals who are plaintiffs in this case.

47. I am aware of many people who are not plaintiffs in this case who nevertheless have become ill, some with various forms of cancer, and some of whom have died.

48. I believe that the frequency and incidents of the illnesses suffered by former employees at Delancy Street is so high as to be something more than coincidence, and in fact is the result of their having worked near burning asbestos.

49. Had I and other individuals known of the extent of the risk that we were working under we would have had an opportunity to minimize or eliminate that risk such as changing employers, changing jobs, being more careful not to be close to the burning asbestos, wearing protective devices and clothing.

50. I am angered and outraged that we were denied that opportunity by the deliberate concealment on the part of du Pont concerning the asbestos.

s/ John Collins
JOHN COLLINS

Sworn and Subscribed to
before me this 8th day of
September, 1990.

s/Barbara B. Lipkin
Barbara B. Lipkin
My Commission Expires
October 13, 1990

Appendix H

Arthur Bell Dated September 10, 1990

MARGOLIS & GORDON
485 Morris Avenue
Springfield, New Jersey 07081
(201) 467-5820
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 86-3324 (GEB)

JAMES JOHN BRADLEY and CATHERINE BRADLEY, his wife, et al.,

Plaintiffs,

vs.

JOHN DOE I, et als.,

Defendants.

-and-

E.I. DU PONT NEMOURS & COMPANY, a corporation of the State of Delaware,

Defendant-Third Party Plaintiff,

vs.

Appendix H

SCOTT LABORATORIES, INC., SCOTT LABORATORIES, LTD., and ROBERT A. KEASBEY CO.,

Third-Party Defendants.

AFFIDAVIT

STATE OF NEW JERSEY) SS:
COUNTY OF UNION)

ARTHUR BELL, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the plaintiffs in the law suit involving the Du Pont Company as a result of its sending to my employer, Engelhard Industries, material containing asbestos, for the purpose of refining during 1971 through 1982.

2. I was employed at Engelhard Industries at its Delancy Street location during many of the years when the Du Pont asbestos was processed.

3. I was actually assigned to work within one of the two buildings in which I am informed the Du Pont material was processed, namely Building 18.

4. That processing involved material being burned up in large furnaces.

5. As a result of the furnace operation, there was a very large amount of dust, fumes and smoke that was created.

6. This dust, fumes and smoke was not confined within the

furnaces but came out through the doors, and the conditions within the major buildings, 7 and 18, were very bad with regard to the atmosphere.

7. I worked closely near the burning operation for many years during the 1970's and up through 1983 and thereafter.

8. The only other exposure to asbestos that I was involved in was during the course of my duties as a pipefitter, when I worked with insulation on pipes and other equipment, which insulation probably was asbestos.

9. Although I worked with asbestos as a pipefitter, the dust that I was exposed to from the furnaces was constant and much more intense.

10. The conditions within Building 18, where I was assigned for many years, were extremely dusty,and that dust was in part created by the burning in furnaces of material from the Du Pont Company, some of which contained asbestos, as I learned in August of 1984.

s/ Arthur Bell
ARTHUR BELL

Sworn and Subscribed to
before me this 10th day
of September, 1990

s/Antionette Thomas
Antoinette Thomas
Notary Public of New Jersey
My Commission Expires Feb. 27, 1994

APPENDIX I — PLAINTIFFS' MEDICAL EXAMINATIONS

James Bradley Dated August 30, 1985

JOSEPH J. AARON, M.D.
510 Old Short Hills Road
Short Hills, New Jersey 07070

August 30, 1985

Margolis and Gordon
485 Morris Avenue
Springfield, New Jersey 07081

Re: Mr. James Bradley Age-54

Dear Sirs:

At your request I examined Mr. James Bradley in my office on August 30, 1985. He gave me the following history:

Mr. Bradley worked for Englehard Industries from 1963 until the present time. He states that he is a chemical operator and was exposed to chemical fumes, dust, and asbestos. He states that he has frequent cough esp. in the morning, productive of greenish-yellow sputum. He states that he has shortness of breath on walking 1-2 blocks and climbing one flight of stairs.

Mr. Bradley states that he has had a workers' compensation case approx. 10 years ago for a burn on his left hand. He has had no workers' compensation cases in the past for a pulmonary condition.

Previous Illness: Hemmorroid surgery in Dec. 1984.

Appendix I

Family History: None contributory

Habits: Smokes one pack a day for several years. He has been a smoker for 40 years. He drinks one cup of coffee a day. He does not drink tea. He drinks 2-3 beers a day. He takes no medication. He has had no treatment for a pulmonary condition.

Physical Examination:
Height-5'11½" Weight-176 lbs. Pulse-88/min. B.P.-144/86
Resp.-16/min. Tem.-afeb.
Head-normocephalic
Ears-normal canals. TM's dull reflexes, part. occ by cerumen
Nose and Throat-sl. injected. Upper dentures.
Chest-normal configuration
Heart-soungs good quality
Lungs-occ. rhonchi bilat.
Abdomen-no masses or tenderderness
Extremities-normal

Laboratory Data:
Urine Analysis: Sp. Gr.-1.026 Alb. - neg. Glucose-neg.

Pulmonary Function Studies

Vital Capacity-Predicted-4370cc
Vital Capacity-Patient -4450cc = greater than 100% of predicted

Seconds	Total Vital Capacity	%of Total V.C.	Normal
1	2975cc	67%	83%
2	3675cc	83%	94%
3	4025cc	90%	97%

Appendix I

Chest X-Ray:
The heart, great vessels and the mediastinum are within normal limits. There are increased interstitial markings.

Conclusion:
Based on the history and findings, it is my opinion that Mr. Bradley has chronic bronchitis and pneumoconiosis. The pneumoconiosis is probably due to asbestos. I would estimate a permanent disability of 40% of total. Based on the history, it is my opinion that his pulmonary condition is the result of his exposure to chemical fumes, dust, and asbestos in his work at Englehard Industries.

Respectfully,

Joseph J. Aaron, M.D.
Joseph J. Aaron, M.D.

P.S. I have had the opportunity to review the report of the Professional Health Services, dated Sept. 21, 1984.

Appendix I

Herman Brown Dated January 27, 1986

JOSEPH J. AARON, M.D.
510 Old Short Hills Road
Short Hills, New Jersey 07078

January 27, 1986

Margolis and Gordon
485 Morris Avenue
Springfield, New Jersey 07081

Re: Mr. Herman Brown Age-67

Dear Sirs:

At your request I examined Mr. Herman Brown in my office on January 27, 1986. He gve me the following history:

Mr. Brown worked for Engelhard Industries from 1965 until April 1, 1965 as a sweeper. He states that he was exposed to dust, chemical fumes, and asbestos. He states that he has not been exposed to these substances since he retired. He states that he has shortness of breath on walking several blocks, walking up a hill, or climbing a flight of stairs. He states that he has a frequent cough productive of yellow colored sputum.

Mr. Brown states that he has not had a workers' compensation case in the past.

Previous Illnesses: None

Family History: Two sisters had Tuberculosis.

Appendix I

Habits: He has smoked one pack of cigarettes a day for many years. He drinks one cup of tea and coffee a day. He drinks beer occ. He does not take any medication.

Physical Examination:
Height-5'5" Weight-102 lbs. Pulse-88/min. B.P.-130/74
Resp.-16/min.
Temp.-afeb.
Head-normocephalic
Ears-normal canals. TM's dull reflexes
Nose and Throat- no injection. Complete upper and partial lower dentures
Chest-normal configuration
Heart-grade 3 systolic murmur at the aortic area and LSB.
Lungs-no rales or wheezes
Abdomen-no masses or tenderness
Extremitites-normal

Laboratory Data:
Urine Analysis: Sp. Gr.-1.024 Albumin-neg. Glucose-neg.

Pulmonary Function Studies

Vital Capacity-Predicted-3480cc
Vital Capacity-Patient-1600cc = 46% of Predicted

Seconds	Total Vital Capacity	% of Total V.C.	Normal
1	1250cc	78%	83%
2	1500cc	94%	94%
3	1600cc	1008	97%

Chest X-Ray:
The heart, great vessels, and mediastinum are within normal limits.

Appendix I

There are increased bronchovascular markings bilaterally. There is blunting of the costophrenic sinus, and an infiltrate in the left upper lobe.

Conclusion:

Based on the history and findings, it is my opinion that Mr. Brown has chronic bronchitis and pneumoconiosis. The pneumoconiosis is probably due to asbestos. I would estimate a permanent disability of 75% of total. Based on the history, it is my opinion that his pulmonary condition is the result of his exposure to chemical fumes, dust, and asbestos in his work at Englehard Industries.

Respectfully,

Joseph J. Aaron, M.D.
Joseph J. Aaron, M.D.

P.S. I had the opportunity to review the report of the PHS dated 5-25-84. I also referred Mr. Brown to a private physician to follow up the infiltrate in his lung.

Appendix I

Arthur Bell Dated March 3, 1986

JOSEPH J. AARON, M.D.
510 Old Short Hills Road
Short Hills, New Jersey 07078

March 3, 1986

Margolis and Gordon
485 Morris Avenue
springfield, New Jersey 07081

Re: Mr. Arthur Bell Age-64

Dear Sirs:

At your request I examined Mr. Bell in my office on March 3, 1986. He gave me the following history:

Mr. Bell worked for Engelhard Industries from 1967 until the present time as a pipe fitter. He states that he was exposed to chemical fumes, dust, and asbestos. He states that he has shortness of breath on walking several blocks, climbing up a hill, and walking one flight of stairs. He states that has a frequent couch productive of yellow colored sputum. He states that he has frequent wheezing, asp. during the night.

Mr. Bell states that he has not had a workers' compensation case in the past.

Previous Illnesses: Heart attack in 1979. He states that he has not been treated for a lung disability in the past.

Appendix I

Family History: None contributory

Habits: He states that he has not smoked since 1979. He prev. smoked ½ pack a day. He drinks 2 cups a coffee a day. He occ. drinks tea. He does not drink alcohol. He takes medication for hypertension.

Physical Examination:
Height-5'7½'' Weight-160 lbs. Pulse-76/min. B.P.-140/90 Resp. 16/min.
Temp.afeb.
Head-normocephalic
Ears-normal canals. TM's dull reflexes
Nose and Throat-mucosa congested
Chest-normal configuration
Heart-sounds good quality
Lungs-no rales or wheezes. Occ. rhonchi bilaterally.
Abdomen-no masses or tenderness
Extremities-normal

Lab. Data:
Urine Analysis: Sp. Gr. 1.030 Glucose-neg. Albumin-neg.

Pulmonary Function Studies

Vital Capacity-Predicted-3710cc
Vital Capacity-Patient -2000cc = 54% of Predicted

Seconds	Total Vital Capacity	% of Total V.C.	Normal
1	1300cc	65%	83%
2	1700cc	85%	94%
3	1900cc	95%	97%

Chest X-Ray:
The heart, great vessels, and mediastinum are within normal limits. There are increased bronchovascular markings bilaterally.

Conclusion:
Based on the history and findings, it is my opinion that Mr. Bell has chronic bronchitis and pneumoconiosis. I would estimate a permanent disability of 65% of total. Based on the history, it is my opinion that his pulmonary condition is the result of his exposure to chemical fumes, dust, and asbestos in his work at Engelhard Industries.

Respectfully,

Joseph J. Aaron, M.D.
Joseph J. Aaron, M.D.

Appendix I

John Collins Dated May 5, 1986

JOSEPH J. AARON, M.D.
510 Old Short Hills Road
Short Hills, New Jersey 07078

May 5, 1986

Margolis and Gordon
485 Morris Avenue
springfield, New Jersey 07081

Re: Mr. John Collins Age-48

Dear Sirs:

At your request I examined Mr. John Collins in my office on May 5, 1986. He gave me the following history:

Mr. Collins worked for Engelhard Industries from 1961 until the present time as a chemical operator. He states that he was exposed to chemical fumes, dust, and asbestos. He states that he has shortness of breath on walking several blocks, climbing a flight of stairs, and walking up a hill. He states that he has a frequent cough productive of white-yellow colored sputum.

Mr. Collins states that he has not had a workers' compensation case in the past for a lung condition.

Previous Illnesses: None

Family History: None contributory.

Appendix I

Habits: He states that he never smoked. He occ. drinks coffee and tea. He does not drink alcohol. He states that he has not been treated for a pulmonary condition and does not take medication.

Physical Examination:
Height-5'7" Weight-154½ lbs. Pulse-76/min. B.P.-136/84
Resp.-16/min. Temp.-afeb.
Head-normocephalic
Ears-normal canals. TM's dull reflexes
Nose and Throat-normal
Chest-normal configuration
Heart-sounds good quality
Lungs-no rales or wheezes
Abdomen-no masses or tenderness
Extremities-normal

Laboratory Data:
Urine analysis: Sp. Gr.-1.028 Glucose-neg. Albumin-neg.

Pulmonary Function Studies

Vital Capacity-Predicted-4110cc
Vital Capacity-Patient-3375cc = *82%* of Predicted

Seconds	Total Vital Capacity	% of Total V.C.	Normal
1	2000cc	59%	83%
2	2600cc	77%	94%
3	3000cc	89%	97%

Chest X-Ray:
The heart, great vessels, and mediastinum are within normal limits. There are increased bronchovascular markings bilaterally.

Appendix I

Conclusion:
Based on the history and findings, it is my opinion that Mr. Collins has chronic bronchitis and pneumoconiosis. I would estimate a permanent disability of 40% of total. Based on the history, it is my opinion that his pulmonary condition is the result of his exposure to chemical fumes, dust, and asbestos in his work at Engelhard Industries.

Respectfully,

Joseph A. Aaron, M.D.
Joseph A. Aaron, M.D.

P.S. I had the opportunity to review the report of PHS dated 10-15-84.

Appendix I

John Carew Dated June 12, 1986

JOSEPH J. AARON, M.D.
510 Old Short Hills Road
Short Hills, New Jersey 07078

June 12, 1986

Margolis and Gordon
485 Morris Avenue
Springfield, New Jersey 07081

Re: Mr. John Carew Age-65

Dear Sirs:

At your request I examined Mr. Carew in my office on June 12, 1986. He gave me the following history:

Mr. Carew worked for Engelhard Industries from 1968 until the present time as a pipe fitter. He states that he was exposed to chemical fumes, dust, and asbestos. He states that he has shortness of breath on walking less than one mile. He states that he has an occ. none productive cough.

Mr. Carew states that he has not had a workers' compensation case in the past for a lung disability.

Previous Illnesses: He states that he had surgery in 1984 for blocked arteries to his head. Left inguinal hernia repair 30 years ago. Surgery for a rectal cyst 27 years ago.

Family History: Father and brother-heart disease.

Appendix I

Habits: He states that he smoked one pack a day from age 17 until 10 years ago. He states that he has not smoked since then. He drinks 2 cups of coffee a day. He does not drink tea or alcohol. He states that he has had no medical treatment for a pulmonary condition.

Physical Examination:
Height-5'3" Weight-143½ lbs. Pulse-68/min. B.P.-164/90
Resp.-16/min. Temp.-afeb.
Head-normocephalic
Ears-normal canals. TM's dull reflexes. Part. occ. by cerumen
Nose and Throat-normal. Upper dentures. Lower teeth missing.
Neck-Bilateral surgical scars ant. neck.
Chest-normal configuration
Heart-sounds good quality
Lungs-no rales or wheezes
Abdomen-no masses or tenderness
Extremities-normal. Heberdenes nodes.

Laboratory Data:
Urine Analysis: Sp. Gr.-1.024 Glucose-neg. Albumin-neg.

Pulmonary Function Studies

Vital Capacity-Predicted-3260cc
Vital Capacity-Patient -2220cc = *68%* of Predicted

Seconds	Total Vital Capacity	% of Total V.C.	Normal
1	1750cc	79%	83%
2	2100cc	95%	94%
3	2220cc	100%	97%

Appendix I

Chest X-Ray:
The heart, great vessels, and mediastinum are within normal limitis. There are increased bronchovascular markings bilaterally.

Conclusion:
Based on the history and findings, it is my opinion that Mr. Carew has chronic bronchitis and pneumoconiosis. I would estimate a permanent disability of 45% of total. Based on the history, it is my opinion that his pulmonary condition is the result of his exposure to chemical fumes, dust, and asbestos in his work at Engelhard Industries.

Respectfully,

Joseph J. Aaron, M.D.
Joseph J. Aaron, M.D.

P.S. I had the opportunity to review the results of PHS and copies of the record of JFK Medical Center for admissions of December 11, 1983, January 23, 1984 and April 17, 1984.

Appendix I

James Benson Dated June 1, 1986

JOSEPH J. AARON, M.D.
510 Old Short Hills Road
Short Hills, New Jersey 07078

July 1, 1986

Margolis and Gordon
485 Morris Avenue
Springfield, New Jersey 07081

Re: Mr. James Benson Age-51

Dear Sirs:

At your request I examined Mr. Benson in my office on July 1, 1986. He gave me the following history:

Mr. Benson worked for Engelhard Industries from 1979 until the present time as a oiler and maintenance man. He states that he was exposed to chemical fumes, dust and asbestos. He states that he has shortness of breath on walking several blocks, climbing on flight of stairs, and walking up hill. He states that he has a frequent cough productive of yellow-green colored sputum. He states that he has occ. chest pain.

Mr. Benson states that he has not had a workers' compensation case in the past for lung disability.

Previous Illnesses: Right inguinal hernia repair in 1960.

Family History: None contributory

Appendix I

Habits: He states that he never smoked. He drinks 1-2 cups of coffee a day. He states taht he occ. drinks tea and alcohol. He states that he has had no medical treatment for a pulmonary condition.

Physical Examination:
Height-6'2" Weight-265 lbs. Pulse-88/min. B.P.-126/80
Resp.-16/min. Tem.-afeb.
Head-normocephalic
Ears-normal canals. TM's dull reflexes.
Nose and Throat-normal. Many teeth missing.
Chest-normal configuration
Heart-sounds good quality
Lungs-no rales or wheezes
Abdomen-no masses or tenderness
Extremities-normal

Laboratory Data:
Urine Analysis: Sp. Gr.-1.026 Glucose-neg. Albumin-neg.

Pulmonary Function Studies

VItal Capacity-Predicted-4740cc
Vital Capacity-Patient -2900cc = 61% of Predicted

Seconds	Total Vital Capacity	% of Total V.C.	Normal
1	1900cc	66%	83%
2	2600cc	90%	94%
3	2875cc	99%	97%

Chest X-Ray:
The heart, great vessels, and mediastinum are within normal limits. There are increased bronchovascular markings bilaterally.

Appendix I

Conclusion:
Based on the history and findings, it is my opinion that Mr. Benson has chronic bronchitis and pneumoconiosis. I would estimate a permanent disability of 50% of total. Based on the history, it is my opinion that his pulmonary condition is the result of his exposure to chemical fumes, dust, and asbestos in his work at Engelhard Industries.

Respectfully,

Joseph J. Aaron, M.D.
Joseph J. Aaron, M.D.

APPENDIX J — PLAINTIFFS' EXPERT REPORTS

Joseph Aaron, M.D. Dated September 6, 1990

JOSEPH J. AARON, M.D.
510 Old Short Hills Road
Short Hills, New Jersey 07078

September 6, 1990

Margolis & Gordon
485 Morris Avenue
Springfield, New Jersey 07081

Dear Sirs:

You have asked me to supplement my individual reports concerning the patients whose pulmonary claims arose from their employment at Engelhard Industries, located on Delancy Street in Newark, New Jersey.

In my opinion, exposure to asbestos was a contributing cause, of some significance, to the development of the pulmonary conditions which I found with respect to those patients. This opinion, of course, will depend on the facts given to me with respect to the exposure of any particular individual to asbestos, with respect to the length, intensity, and duration of exposure.

Any particular exposure substantial enough to contribute to the development of a pulmonary condition in any of the individuals is also significant enough to be a sole or contributing cause of an asbestos-related malignancy, such as lung cancer.

My opinion is based upon the facts given to me concerning the general asbestos exposure at the plant site, namely that for the time period between 1970 and August of 1983, asbestos-containing materials were in fact incinerated and otherwise processed at the location where the plaintiffs were employed on a regular basis, that the asbestos became airborne, and that the various patients were exposed to the airborne asbestos more frequently and intensely than just occasionally.

An exposure that might be even less than significant in terms of being a contributing cause of restrictive pulmonary disability, by way of pneumoconiosis, including asbestosis, can nevertheless be a contributing factor with respect to the development of malignancies, particularly lung cancer, and mesothelioma.

The harmful effects of asbestos exposure, with respect to pulmonary disease, are well documented in the medical literature, and accepted by the overwhelming majority of physicians in the field. The same is true with respect to the effect of exposure to asbestos in the development of lung cancer and other malignancies, including those in the throat, and gastrointestinal areas.

There is a significant body of medical opinion that holds that there is no truly "safe" level of exposure to asbestos.

With respect to the individuals who are plaintiffs in the instant case, whom I have examined, as I have testified, I believe that their pulmonary disability is related to exposure to asbestos. A significant bases for this reasoning is the lowered force vital capacity reading in the pulmonary function studies. This indicates restrictive lung disease of which pneumoconiosis is one. Asbestos-related disease is a form of pneumoconiosis.

It is my understanding that some of these individuals exhibit objective findings by ways of x-rays, supporting the view that asbestos exposure has contributed to a lung disease.

I want to point out, however, that asbestos-related lung disease, even that which some physicians describe as asbestosis, can exist in individuals and does exist in individuals even though there are no x-ray findings to that effect. It is widely known that post-mortem autopsies sometime reveal asbestosis and other asbestos-related lung damage, even though x-rays taken during the patient's lifetime do not indicate such findings.

It is widely accepted that asbestos can have a harmful effect on individuals for a long time before x-ray evidence of asbestos-related disease can be shown. This is, of course, principally related to the fact that x-ray testing, similary to almost all medical testing, is not 100 percent revealing, but is limited, to some extent.

It is medically appropriate and prudent that all individuals who are exposed to some meaningful degree to the asbestos contained in the material sent to Engelhard Industries for 13 years by DuPont should have periodic medical examinations. These examinations should take place no less frequently than once each year.

With respect to such medical monitoring, it is important to distinguish between monitoring for the purpose of detecting the development or progression of pulmonary disease, and monitoring for the purpose of establishing early detection of cancer, whether in the lungs or elsewhere.

Since there is very little that can be done by way of treating progressive pulmonary disease resulting from asbestos exposure, a response to an early detection of the development of that disease may very well be limited in terms of medical managing.

Appendix J

On the other hand, early detection of cancer in various parts of the body is absolutely essential, in terms of the efforts that can be made in order to effect a cure.

The medical examinations should consist of, as a minimum, an office examination, a chest x-ray, and a pulmonary function study, and the cost is approximately $225.

An individual who is exposed to asbestos has a greatly increased risk of developing lung cancer, compared to an individual who has not been exposed to asbestos. This increased risk does not depend at all on the patient's having asbestos-related pulmonary disease, but depends only upon the fact that there was exposure to asbestos.

Therefore, the fact that any individual might not have developed a pulmonary disease as a result of his exposure to asbestos does not mean that he still does not have the same heightened risk of developing lung cancer as a result of asbestos exposure.

Respectfully,

s/ Joseph J. Aaron, M.D.
JOSEPH J. AARON, M.D.

Appendix J

Peter M. Hay, Ph. D, Consulting Chemist Dated December 10, 1990

PETER M. HAY, PhD
24 Bedford Road
Summit, N.J. 07901

December 10, 1990

Marc J. Gordon, Esq.
485 Morris Avenue
Springfield, NJ 07081

Dear Mr. Gordon:

I understand that your clients at their place of employment worked in the vicinity of furnaces where asbestos-containing materials were being incinerated.

I have been informed that the material being incinerated included used filter pads. The filter pads were a resin-bonded structure of cellulose and asbestos fibers and were mixed with wet filter cake containing solvents.

The filter pads and other materials were placed in trays and put in a furnace where temperatures of up to 1500 degrees F. are maintained overnight.

What most likely took place during the incineration is the following: first, the solvents evaporated and burned off; second, the dry residue caught fire and the cellulose and resin bonding material burned off, leaving only the asbestos and other non-combustible materials. At this point the temperature of the residue likely was below 500 degrees Fahrenheit. During the burning, the asbestos fibers probably became loose and subject to becoming airborne on the stream of combustion gases.

I am aware of the contention that asbestos is transformed at high temperatures into the non-asbestos substances forsterite and silica. I do not contest this, but expect it to happen only after some prolonger time at higher temperatures such as 1,500 degree Fahrenheit.

Moreover, silica itself is known to cause lung disease in a fashion similar to asbestos.

s/ Peter M. Hay Peter M. Hay, Consulting Chemist

Appendix J

SEAL OF THE ASSOCIATION OF CONSULTING CHEMISTS AND CHEMICAL ENGINEERS, INC.

PETER M. HAY CERTIFICATE NO. 675

CONSULTANT ON CHEMICALS,
THEIR REGULATIONS,
PROPER USE AND DISPOSAL

President
ARIA Chem-Services
24 Bedford Road
Summit, NJ 07901

Telephone: (201) 273-6729
Computer Modem: (201) 273-6729
MCI Mail-Box Number 323-1795
CompuServe ID 72500,504

B.S. Chemistry, Antioch College, 1944
Ph.D. Organic Chemistry, Ohio State University, 1951

Technical Societies: American Chemical Society, American Association for Advancement of Science, New York Academy of Science, New Jersey Academy of Science, New Jersey Governor's Science Advisory Committee (Past Chairman).

Listed In: American Men and Women of Science, Who's Who in Technology Today, Leading Consultants in Technology, CONTACT TOXICS: A Guide to Specialists in Toxic Substances.

Previous Experience: Olin Industries, New Haven, CT, Research Supervisor, 1952-59; Celanese Plastics, Newark and Clark, NJ, Technical Service Manager, 1960-64, J. P. Stevens Research, Garfield, NJ, Research Supervisor, 1964-67; Sandoz Colors and Chemicals, Inc., East Hanover, NJ, Development Manager, 1968-72; Sandoz Colors and Chemicals, Inc., Environmental Affairs Managers, 1972-85.

Appendix J

Engaged In Consulting Practice Since: 1985

Publications & Patents: Publications on organic chemistry, emulsion polymerization, polypropylene crystallization, plastics testing, textile flame retardants, electric discharge polymerization, hair shampoo formulation. Patents on packaging film coatings, heat sealable plastic foam, fabric softener, carpet flame retardant.

Scope Of Activities: Giving advice on regulatory status of chemicals; handling paperwork in dealing with government regulations (EPA. TSCA and RCRA, OSHA, DOT, FDA packaging additives); assisting attorneys in compliance and liability cases; expert testimony on chemicals and chemistry; evaluating literature for toxic and environmental effects of chemicals; organizing and giving training in chemical safety and regulatory compliance; organizing and managing technical and business meetings and seminars.

Recent Assignments: 1) Prepared annual SARA Title III (Emergency Planning and Notification Rules) Toxic Chemical Release Form R report for a pigment manufacturing company. 2) Prepared annual EPA CAIR (Comprehensive Assessment Information Rule) report for an importing company. 3) Evaluated hazards of specialty chemicals for a chemical manufacturer and assisted in preparing OSHA safety data sheets (MSDS). Recommended warning phases for labels to go w/ MSDA hazards. 4) Verified and corrected TSCA (TOXIC "Substances" Control Act) registration numbers for a chemical distributor. Evaluated adequacy of existing MSDSs. 5) Assisted regulatory attorney in evaluating TSCA reporting problems for a chemical company. 6) Advised paint company on EPA FIFRA (Federal Insecticide, Fungicide and Rodenticide Act) registration of paint formulations containing fungicide. 7) Prepared PMNS for dyestuff manufactuer.

APPENDIX K — RESPONDENT'S MEMORANDUM AND CORRESPONDENCE

Cellusose Asbestos Filter Pads — W.R. Freeman Letter Dated July 12, 1983

cc: A. T. Gentilucci-C&P Wilm
J.C. Day/R. B. Root
G. J. Marr
J. R. Scott

E. I. DuPont de Nemours & Company

MEMPHIS

CHEMICALS AND PIGMENTS DEPARTMENT

July 12, 1983

DUPONT CONFIDENTIAL — SPECIAL CONTROL

TO: T. E. LEWIS — C&P — WILM

FROM: W. R. FREEMAN — C&P — MEMPHIS

CELLULOSE ASBESTOS FILTER PADS

The following are facts concerning use of cellulose asbestos filter pads in Hydrogen Peroxide Area primary filters. This came to our attention in a June 17 letter and only last week was recognized by the Occupational Health Office as creating a problem with the metal reclaimers. When our investigation uncovered the fact that catalyst reclaimers had not been notified that filter pads contained asbestos, we immediately notified our current vendor, Johnson-Matthey, on the morning of July 8 to hold up processing of the material he has on hand because of a potential problem we were investigating. Later that afternoon, Wilmington notified Martin Durney, Vice-President of Production, that the material contained asbestos.

The area was initially notified in February 1983 by phone of a change in filter papers. Subsequently, the area received written notification and a PCR was initiated. The June 17 letter was the result of developing information for the PCR. The letters are attached.

We do not believe the filter pads present a hazard to our employees because the asbestos is not friable. We have done some general sweep monitoring across the plant for asbestos. In the Hydrogen Peroxide Area there were five samples taken in 1978 ranging from non detected to .01 fibers/cc, and two samples in 1980 showing non detected. TLV limit is 2.0 fibers/cc for eight hours exposure. We plan further comfirmation with personnel monitorings during the next filter change. We have notified our employees of the situation.

There are 16 primary filters with 42 pads per filter. Each pad contains about 10% chrysotile asbestos (magnesium silicate). There were 142 filter changes in 1982 resulting in the processing of about 500 lbs. of asbestos. We started using these particular pads in early 1970. We purchased the pads from Scott Laboratories, LTD., Pickering Ontario. Prior to 1978 we placed the orders through their California plant but the pads were shipped from Ontario. After 1978, orders were placed directly with the Ontario plant because the California plant discontinued manufacture of the pads altogether. The Ontario plant is also currently supplying DuPont Hydrogen Peroxide licensee plants in Taiwan and Korea and plans to contact these plants regarding the change. A copy of their label is attached and shows no mention of asbestos. Also attached is a copy of our import certificate and a recent purchase order.

We have been reclaiming catalyst for a number of years. Prior to 1971 we only used one reclaimer, Englehard Industries, Newark, N. J. From 1971 to 1975 we used Johnson Matthey, Winslow & Deptford, N. J. From 1975, there were six additional companies handling truckload quantities and two handling samples. They are listed in the attachments.

Currently, Johnson-Matthey is the only reclaimer with material on hand. They have 152 drums, some of which contain the filter pads.

In 1976, the plant tested F-50 filter paper for use in the secondary filters to replace the fiber glass filters. Correspondence with the vendor and subsequent PCR's indicate we were aware of the asbestos content in the F-50 test material as well as in the F-30 material which we were using in the primary filters. The literature indicates the paper presented no health hazard in routine handling but failed to recognize the potential health hazard at the reclaimer. The test material did not work and the PCR was closed in 1978.

Program

Plant actions include:

- Notification of employees - completed.
- Monitoring the next filter change - scheduled.
- Preparation of back up statement - in progress.
- Replacement of filter pads with non-asbestos pads - in progress.

Appendix K

Wilmington actions include:

- Visit to Johnson-Matthey - July 13.
- Returning unprocessed drums to Memphis.
- Labeling and shipping semi-processed drums to Memphis.
- Notifying other reclaimers.
- Determining TSCA 8a or 8e requirements.

We are expediting conversation of the plant to non-asbestos filter pads and expect to be fully converted by 9/1/83 pending successful confirmation of plant tests which will begin by 7/25/83. At that time, the plant will have built a drum inventory of primary filter cakes with Pd recovery potential of approximately $50M.

WRF:nj
attachments

Appendix K

Robert R. Bonczek, Dir. of Safety, Health & Environmental Affairs, Letter to U.S.E.P.A. Dated August 5, 1983

E.I. DuPont de Nemours & Company
WILMINGTON, DELAWARE 19898

ENVIRONMENTAL QUALITY COMMITTEE

AUGUST 5, 1983

Document Control Officer (WH-557)
Chemical Information Division
Office of Toxic Substances
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

Gentlemen:

Du Pont is aware that EPA is currently investigating asbestos manufacture and use activities and that, as part of this effort, the Agency has requested information on industrial filters containing asbestos components. 47 *Fed. Req.* 33198 (1982). Because the asbestos present in such filters is bound up so as to prevent airborne release during handling, storage and use, the filter pads are not generally labeled as containing asbestos. It has come to our attention that disposal of the filters by incineration or destruction by some other mode might result in the potential release of airborne levels of the bound asbestos fibers. Absent labeling of the asbestos content by the filter manufacturer, downstream customers and processors might not be adequately put on notice so as to ensure compliance with applicable OSHA requirements. 29 CFR 1910.1001. Du Pont believes that this information could be useful to EPA's assessment of exposure potential.

Since 1970 Du Pont has used at one of its plants a cellulose industrial filter which contains ten percent chrysotile asbestos. Subsequent to use, Du Pont sent the spent filter medium containing precious metal residues to various reclaimers who reprocessed the material to extract the precious metal content. Recently Du Pont recognized that during this reclamation activity, asbestos fibers could become airborne. However, Du Pont has no knowledge that this, in fact, occurred. Moreover, Du Pont has no reason to believe that the reclamation operations were not in compliance with applicable OSHA standards. Du Pont has notified its current reclaimer of the asbestos content of the spent filters and has retrieved both unprocessed and semi-processed drums of the material from the reclaimer's site. Other processors, who had in the past reclaimed such process residue, are being notified that the asbestos-containing filters were included in the process material that had been reclaimed.

Du Pont does not believe that the circumstances present reportable Section 8(e) information since the Administrator is aware of the adverse effects of asbestos exposure and because such effects are documented in the scientific literature. 47 *Fed. Reg*. 23760 (1982). In addition, the Administrator is aware that industrial filters and similar articles contain asbestos. 47 *Fed. Reg*. 33198 (1982). Moreover, as previously noted, Du Pont has no knowledge that reclamation of the process material did, in fact, result in the generation of airborne asbestos or that reclamation operations were not in compliance with applicable OSHA standards so as to pose a substantial health or environmental risk. Should EPA disagree with this conclusion, Du Pont believes that this notice satisfies any TSCA notification obligation.

Very truly yours,

s/ Robert R. Bonczek
ROBERT R. BONCZEK
Director of Safety, Health
and Environmental Affairs

RRB:mdm

cc: Dr. R. Leonard Vance
Director of Health Standards
Occupational Safety and
Health Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Appendix K

Ted E. Lewis — August 19, 1983 Visit to Engelhard Letter Dated August 29, 1983

E.I. DuPont de Nemours & Company BJReilly-Legal-D7094-1

WILMINGTON, DELAWARE 19898

CHEMICALS AND PIGMENTS DEPARTMENT

AUGUST 29, 1983

MEMORANDUM TO FILE
FROM: T. E. LEWIS

AUGUST 19, 1983 VISIT TO ENGELHARD CORPORATION
Newark, New Jersey

PURPOSE: To discuss their previous processing of yellow label spent catalyst.

PRESENT:		
	T. E. Lewis	-Du Pont
	W. J. Bareford	-Du Pont
	R. C. Stewart	-Englehard
	E. C. Fredericks	-Engelhard
	J. R. Newbrough	-Engelhard

DISCUSSION:

- **We reviewed the history of yellow label spent catalyst, noting that it contained a filter paper which had been made with 10% crysotile asbestos from about 1970 to persent. In the filter paper, the asbestos fibers were bound, hence, not free so there was no opportunity for** exposure. After burning the organic binders would be gone, we advised them that they received about 1 MM lbs. of yellow label material between 1971 and 1982.

- We estimated that the yellow label material contained less than 50% filter paper.
- We reviewed the OSHA asbestos Standard 1910-1001. They said they were familiar with it.
- They expressed concern and said they would be reviewing the facts of the case with their lawyers.
- We advised them that we had informed EPA of the situation. They asked for a copy of the letter, which we agreed to send.
- We gave them a copy of "The Pathogenesis of Asbestos-Associated Diease" by Craighead and Mossman and reviewed the main points of the article.
- They said they appreciated the need for us to inform them of the situation.
- In a phone conversation with Stewart on 8/22, I requested that they let us know in advance of any employee communications of the subject; he agreed to do so.

EL/nvw

Appendix K

Cellulose Asbestos Filter Pad Update — W.R. Freeman Letter Dated September 15, 1983

cc: A. T. Gentilucci-C&P-Wilm.
T. E. Lewis-C&P-Wilm.
R. B. Root
G. J. Marr
J. R. Scott
W. W. Schrimper

September 15, 1983

PERSONAL AND CONFIDENTIAL

TO: J. C. DAY
FROM: W. R. FREEMAN

CELLULOSE ASBESTOS FILTER PAD UPDATE

This memo updates the asbestos filter pad situation.

CURRENT STATUS

- The Hydrogen Peroxide Area is 90% converted to non-asbestos filter pads. Complete conversion is expected by September 23.
- When the conversion is completed, there will still be over 2000 unused filter pads worth about $15M. The Vendor, Scott Laboratories, has not agreed to take back these pads. They can be disposed of in the sanitary landfill.
- We will have approximately 172 drums of used filter pads on hand when the conversion is complete. The

palladium value of this material is estimated at $100M. We have been looking for a suitable metals recovery firm to safely process this material (see details below).

DETAILS — PLANT RESPONSIBILITY

- *Employee Notification* — Our employees were notified July 8. Plantwide bulletin was issued August 19 — presenting an update of the situation.
- *Area Monitoring* — Employees were monitored for asbestos during filter changes on July 12 and 13.

  July 12 0.06 and 0.02 fibers/cc

  July 13Both samples were less than 0.01 fibers/cc

  These results are similar to background data. The current TLV is 2.0 fibers/cc. (OSHA plans to reduce this to 0.5 in the near future.)
- *Plant Survey* — A resurvey of asbestos materials used on the Memphis Plant was completed. A number of materials in use still contain asbestos. These are being reviewed for either elimination or substitution with non-asbestos materials. This work should be complete by September 30.
- *Status of Drums at Johnson-Matthey* — There were 132 drums of material at Johnson-Matthey when we informed them to stop processing. The 112 drums of unprocessed material and 20 drums of semiprocessed (unground) material were returned to Memphis July 25. This is part of the inventory to be reclaimed.
- *Licensee Plants* — Scott Laboratories said they would send them a letter informing them of the asbestos content and the change in formulation. T. E. Guenter said the licensees had not received a letter at the time of his trip at the end of July. He will make another

inquiry. They have not reprocessed any of their filter papers since startup.

DETAILS -- WILMINGTON RESPONSIBILITIES

- *TSCA Notifications* — Letter sent to EPA on August 5 informing them of the situation. This was considered to meet the reporting requirements of Section 8(e) of TSCA.

  Letter sent to Scott Laboratories July 18 informing them of the TSCA Section 8(a) reporting rule. Schrimper contacted them on August 5 by phone to explain our situation with the reclaimers and what the July 18 letter was about. Mr. Vagner of Scott Labs indicated they would investigate the need for an 8(a) notification.
- *History of Metals Recovery* — See the attached summary which was prepared from data from W. J. Bareford and S. S. Hall.
- *Visit to Reclaimers* — W. J. Bareford and T. E. Lewis have visited the following reclaimers. Comments on the visits are also noted.

Reclaimers Visited	*Comments*
Johnson-Matthey	Reclaimer felt there was no exposure. They said they would tell the six employees involved.
Engelhard	Reclaimer felt there could have been exposures on handling. Continuing to investigate. We think they will tell their employees but they indicated they would tell us first. We have not heard from them.

PGP Industries	No exposures expected. Precautions taken by reclaimer.
Findet	No exposures — always wore dust masks. Will not tell employees.
Sabin	No exposure expected. Recognized asbestos — tied it up as lag. Probably will not tell employees.
Platina	No exposure expected. Probably will not tell employees.
Metz	No exposure expected. Probably will not tell employees.
Sipi	No exposure expected. Probably will not tell employees.

- *Locate Reclaimer Who can Handle the Asbestos*
  There are some possibilities under consideration:
  National Refining Corp. — Visited by plant and Wilmington personnel on September 13 and are not comfortable with their handling of asbestos. They would be an intermediary processor and would ship material overseas for final recovery of metal and dispostion of asbestos.

  In dealing with the intermediary processors of asbestos, we need to answer the questions: which point does title to the material pass to the contractor, and what if the contractor errs — who is at risk?

  Johnson-Matthey — They have expressed a desire to take the material. Their recovery process uses chemical reaction techniques which would not tie-up the asbestos. The residue containing asbestos would be sent to other processors.

Sabin — They appear to have the best process for handling the asbestos since it would be tied up as a slag. But they do not want to handle the material because they do not plan to tell their employees about the previous material.

WRF/ng
Attachment

Appendix K

Ted E. Lewis — "Yellow Label" Spent Catalyst Shipments Dated September 28, 1983

E. I. Du Pont de Nemours & Company
WILMINGTON, DELAWARE 19898

CHEMICALS AND PIGMENTS DEPARTMENT

September 28, 1983

Engelhard Corporation
429 Delancy Street
Newark, New Jersey 07105

Attention: Robert C. Steward
Vice Present & General Manager

Dear Robert:

Thank you for extending your time and courtesy for our meeting at Newark, New Jersey on August 19, 1983. As discussed, our records indicate you received and processed "yellow label" spent catalyst from the Du Pont Memphis plant as follows:

1971-1974	400,000 lbs.
1975	106,000 lbs.
1976-1977	102,000 lbs.
1978	18,000 lbs.
1979	45,000 lbs.
1980	86,000 lbs.
1981	158,000 lbs.
1982	73,000 lbs.

As we further discussed, Du Pont has recently been informed

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that the filter paper in this material contained 10% asbestos. The purpose of the visit was to apprise you of this information to allow you to determine whether or not any of your employees had been exposed to airborne asbestos fibers during your processing of this material. We again request that you carefully examine the OSHA regulations at 29 CFR 1910.100 to make this determination. We also recommend that you carefully review "The Pathogenesis of Asbestos-Associated Disease" by Craighead and Mossman that we provided to assist you in understanding the physical aspects of asbestos fibers and their medical manifestations.

If you have any further questions, please do not hesitate to write me or call at (302) 774-9350.

Very truly yours,

s/Ted E. Lewis, Manager
TED E. LEWIS, MANAGER
Occupational, Safety and Health

cc:
A. T. Gentilucci-C&P-Wilm.
T. E. Lewis-C&P-Wilm.
R. B. Root
G. J. Marr
J. R. Scott
W. W. Schrimper

December 5, 1983

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Cellulose Asbestos Filter Pads Update No. 2 W.R. Freeman Letter Dated December 5, 1983

PERSONAL AND CONFIDENTIAL

TO: J. C. DAY
FROM: W. R. FREEMAN

CELLULOSE ASBESTOS FILTER PADS
UPDATE NO. 2

Current Status

- The Hydrogen Peroxide Area is no longer using asbestos filter pads. The unused filter pads have been disposed of in the BFI landfill.
- The Area has 408 drums (106,000 lbs.) of used pads. Some of these contain secondary filter pads containing no asbestos. About two-thirds of the drums contain asbestos pads. The Area has evaluated processing either by scraping the catalyst from the pad or by sending the drums to a qualified reclaimer. They have decided to scrape the catalyst themselves beginning after January 1, 1984.
- The Area has 20 drums of semi-processed filter pads containing asbestos. Samples have been sent to W. J. Bareford for processing evaluation by several reclaimers. None have agreed to accept this material to date.

Notification of Licensees

T. E. Guenter has reported that the Taiwan and Korean plants have received their letters from the supplier notifying them of the asbestos content in the filter papers. Both licensees will be fully converted to non-asbestos pads when current inventory is depleted. No further follow up is planned.

Evaluation of Catalyst Recovery Alternatives

- Initial tests indicated the spent catalyst could be scraped from the filter pads rather quickly. This will require about 12 manweeks of effort. The area plans to start this job after the first of the year. One concern is that the bottom of the drums may be wetter and require drying of the material before it can be scraped. Another concern is the burial of the filter pads. If the pads are oil laden, they will have to go to a chemical landfill assuming the asbestos fibers remain combined. If the pads are dry, they may be able to be put directly into a dumpster.
- Reclaim by National Refining Corporation. This does not appear to be a viable alternative because they would be an intermediary processor and would ship the asbestos laden material overseas for final metal recovery and disposition of asbestos. We believe we would lose control of the disposal of asbestos by this method.
- Reclaim by Johnson-Matthey. We reported in our last update that they would be willing to take the material. We have since learned they do not want any asbestos in the material that they process.
- Reclaim by PGP Industries. PGP has submitted a proposal to scrape the asbestos pads and dispose of the pads in an undestructed condition. They would process the scraped catalyst in the usual manner. The cost for

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scraping the catalyst is 50¢/lb. higher than the lowest reclamation costs.

There would be a cost penalty of about $50M by processing in this manner over the Area scraping the filter pads themselves.

WRF/ng

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Cellulose Asbestos Filter Pads Update No. 3 Du Pont Letter Dated February 29, 1984

cc: A. T. Gentilucci-C&P-Wilm.
T. E. Lewis-C&P-Wilm.
D. O. Miller
G. J. Marr
J. R. Scott
W. W. Schrimper

February 29, 1984

TO: R. B. ROOT
FROM:

CELLULOSE ASBESTOS FILTER PADS
UPDATE NO. 3

CURRENT STATUS

- The Hydrogen Peroxide area has been successful in negotiating a favorable price with PGP Industries Inc. to recover the palladium values in the 408 drums of asbestos filter papers.
- PGP has agreed to handle and dispose of the asbestos pads in an environmentally safe manner. T. E. Lewis has reviewed and concurs with their handling procedures.
- Shipment of drums will being March 12. A. Fentin, C&P liaison for precious metals, will follow the recover process at the PGP plant in Waterbury, Connecticut. If PGP runs into unexpected problems, they have been told to stop and re-assess before continuing. Re-assessment will involve consultation with DuPont personnel.

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COST

- There will be a cost penalty of about $24M over the Johnson-Matthey cost of recover of an equivalent amount of palladium from non-asbestos filter pads.
- The estimated cost of scraping the catalyst using Memphis Plant employees and then disposing of the pads in an asbestos landfill was $20M. We endorse the recommendation to accept PGP's offer considering the safety and health questions concerning asbestos, drum handling and lifting, and the fact that the Memphis cost versus the vendor cost penalty are nearly breakeven.

SENT-PROCESSED FILTER PADS

- PGP is evaluating several processing techniques for recovery of palladium and safe disposal of asbestos from 20 drums of semi-processed filter pads. We have agreed to send them a drum for test work. A letter explaining proper disposal of the asbestos will accompany the drum shipment.
- If PGP can not develop an acceptable process, the remaining material may have to be disposed of without palladium recovery in an asbestos landfill using approved procedures.

PROPOSED TIMING

1. Finalize and approve contract — March 9.
2. Begin shipments — March 12.
3. Complete shipments — March 23.
4. Final recommendation on semi-processed material — March 23.
5. All drums off plant site — April 4.

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Cellulose Asbestos Filter Pads — Current Status

T.E. Lewis Letter Dated June 6, 1984

E. I. Du Pont de Nemours & Company
WILMINGTON, DELAWARE 19898

CHEMICALS AND PIGMENTS DEPARTMENT

June 6, 1984

A. T. GENTILUCCI

CELLULOSE-ASBESTOS FILTER PADS
CURRENT STATUS

In August-September, 1983, we visited the eight processors that had handled the cellulose-asbestos filter pads during the years 1971-1983. We advised them of the facts of the situation, discussed the OSHA regulations, and had some general discussion on asbestos-related disease.

Until mid-May, there were no further developments other than the activity with PGP Industries to reclaim the last batch of catalyst on cellulose-asbestos pads.

Recent Developments

- In mid-May, Neil Kaye (Safety, Health and Environmental Director of Engelhard) called to say that they had completely reorganized and, that the new management wished to be briefed on the subject.
- On June 1, Art Fentin and I visited Engelhard and briefed the new management. The old management had

taken no action on the issue. Engelhard handled the majority of the material over the years.

- On June 4, Kaye called to say that they were considering notifying employees and instituting a medical surveillance program. He asked if Du Pont would pay the costs of the program which would involve up to 1,000 people. I gave him no encouragement and said I would be back in touch.
- On June 1, we received a letter from PGP (another of the eight processors) saying they had told their people and looked to us to defend them against claims and indemnify them.

Action (we have received both situations with Legal)

Engelhard

They had other sources of asbestos in the plant, i.e. pipe insulation and until the late sixties, they made catalyst on asbestos supports.

After due consideration, I plan to advise Kaye that we will not agree to their request.

PGP

We have no definite knowledge if they had other asbestos in their plant.

We plan to make no response to their letter.

T. E. LEWIS

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TEL/nvw

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T.E. Lewis Letter Dated August 20, 1984

E.I. Du Pont de Nemours & Company
WILMINGTON, DELAWARE 19898
CHEMICAL AND PIGMENTS DEPARTMENT

cc:
RJLombardo
FEFrench
AFentin
BJReilly-Legal-D-7094-1

August 20, 1984

A. T. GENTILUCCI

CELLULOSE-ASBESTOS FILTER PADS CURRENT STATUS

In July, 1983, we determined that we had been sending a cellulose-asbestos filter pad to reclaimers for recovery of the precious metal content. In August and September, 1983, we visited the eight processors that had handled the filter pads and advised them of the facts of the situation, discussed the OSHA regulations, and had some general discussion on asbestos-related disease.

There were no further developments (other than the activity with PGP Industries to reclaim the last batch of catalyst on cellulose-asbestos pads) until mid-May when Neil Kaye (Safety, Health and Environmental Director of Engelhard) called to say that they had completely reorganized and that the new management wished to be briefed on the subject. On June 1, Art Fentin and I visited Englehard and briefed the new management as we had done in August, 1983.

- On June 4, Kaye called to say that they were considering notifying employees and instituting a medical surveillance program. He asked if Du Pont would pay the costs of the program which would involve up to 1,000 people. I gave him no encouragement and subsequently called him to tell him we would not.
- Kaye called again on August 15 to say they were informing their employees on August 22 and wanted to meet with us to discuss:
  — Their position that we should pay for the medical surveillance; and
  — How contacts with their secondary processors should be handled.

  Over the years, they had shipped their residues from their reclamation to secondary processors who performed further processing. They have concluded that those residues may have had asbestos in them and that the secondary processors may have had exposure.

I suspect they want us to visit the secondary processors. I see no reason to agree to do so, Hedgepath agrees. I propose that we meet with them but make it very clear that we will not pick up their medical costs nor visit their secondary processors. Art Fentin, Bernie Reilly and myself have a tentative date to meet with them on August 28. I will offer to supply information they might fing beneficial.

I seek your concurrence and comments.

s/ T.E. Lewis
T. E. LEWIS

TEL/nvw

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T.E. Lewis Letter Dated September 27, 1984

E.I. DU PONT DE NEMOURS & COMPANY
WILMINGTON, DELAWARE 19898
Chemicals and Pigments Department

cc:

FEFrench
BJReilly
ATGentilucci

September 27, 1984

TO: R. J. LOMBARDO

FROM: T. E. LEWIS

CELLULOS-ASBESTOS FILTER PADS CURRENT STATUS - ENGLEHARD

In July, 1983 we determined that for about 10 years we had been sending a cellulos-asbestos filter pad to reclaimers for recovery of the precious metal content. In August and September, 1983, we visited the eight processors that had handled the filter pads and advised them of the facts of the situation, discussed the asbestos-related disease.

Englehard, who received about 80% of the filter pads, is continuing to press us on two points:

- We should reimburse them for costs associated with employee medical surveillance.
- Because of our ultimate responsibility we should contact

the secondary smelters who processed Englehard residues.

Their proposals are defined in the attached letter and have been rejected by Du Pont on three or four occasions, most recently on September 26 in my phone conversation with Neil Kaye. I said we did not accept ultimate liability and that asking us to pay medical surveillance costs was unreasonable; their employees had many other possible asbestos exposures. I did indicate that we would be glad to visit them to clarify our position. Kaye didn't respond.

Legal concurs with our position and the approach of leaving the initiative to Englehard. Based on their persistence, I don't believe the issue is settled and the possibility exists that they make contact elsewhere in Du Pont.

TEL/nvw
Attachment

APPENDIX L — APPENDIX OF FORMS, FORM 1 IN FED. R. APP. P.

APPENDIX FORMS

FORM I.—

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the . . . . .District
of . . . . .

File Number. . . . .

A.B., Plaintiff
v.
C.D., Defendant.

Notice of Appeal

Notice is hereby given that C.D., defendant above named, hereby appeals to the United States Court of Appeals for the . . . . .Circuit (from the final judgment) (from the order (describing it)) entered in this action on the . . . . . day of . . . . . . 19. .

(S) . . . .
. . . .
(Address)
Attorney for C.D.

Note

Counsel for the appellant is requested to furnish the clerk of the district court with a sufficient number of copies of the original notice to permit the clerk to serve a copy on each party other than the appellant.

Appendix L

FORM 2.—

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A DECISION OF THE TAX COURT

Tax Court of the United States
Washington, D.C.

A.B. Petitioner
v.
Commissioner of
Internal Revenue,
Respondent

Docket No. . . . .

APPENDIX M — NEIL A. KAYE, DIR. OF ENVIRONMENT, HEALTH & SAFETY OF ENGELHARD, LETTER DATED SEPTEMBER 4, 1984

ENGELHARD
SPECIALTY CHEMICALS DIVISION
Menlo Park CN28 Edison New Jersey 08818 (201)321-5000

September 4, 1984

Dr. Ted E. Lewis, Manager
Occupational Safety & Health
E.I. DuPont Company
Wilmington, DE 19898

Dear Ted:

This letter is in response to your request made during our telephone conversation of August 27th that I set forth Engelhard's thinking on DuPont's participation in the formal notification of secondary smelters.

We would request that DuPont undertake the notification of the secondary smelters who received the "yellow label" material because we believe that you would be the best, and most appropriate, party to do so. You have already developed a notification mechanism which you used to notify us. In addition, many of the facts of the matter are known more accurately to you than to us. Under those circumstances, we would in any event have to refer the secondary smelters to you for further information.

We also believe that your participation is appropriate, given the ultimate responsiblity for liability. We would assume, given the role of DuPont in this matter, that you would want to be involved in any discussions with those who might have been damaged. We obviously could not but again refer the secondary smelters to you should their demands exceed our ability to respond.

As we discussed, the question of medical cost reimbursement will be tabled until a later date while we can accrue experience on the level and type of costs incurred.

I will call you early next week to discuss this matter.

Very truly yours,

s/ Neil
Neil A. Kaye, Director
Environment, Health & Safety

NAK/pch

APPENDIX N — DR. BERGERON'S LETTER DATED DECEMBER 5, 1989

CLIFTON G. BERGERON
208 W. Michigan Avenue
Ursana, Illinois 61801

December 5, 1989

Mr. Silvio J. DeCarli, Esq.
Carpenter, Bennett & Morrissey
Three Gateway Center
100 Mulberry Street
Newark, NJ 07102-4082

Dear Mr. DeCarli:

I have reviewed the materials which you supplied relative to the case of Bradley v. Du Pont, et al, and I have reviewed a number of pertinent references dealing with the thermal behavior of chrysotile asbestos. My opinion can be summarized as follows:

Chrysotile asbestos undergoes chemical and physical decomposition when heated to temperatures of approximately 650 C (1202 F). This is a recognized scientific fact — well- documented in the scientific literature and universally accepted by the scientific community. The products of the decomposition reaction are forsterite (M92Si04) — a naturally-occurring, common, rock forming mineral — and silica (Si02).

It is my understanding that the cellulose-chrysotile asbestos filter pads at issue in this lawsuit were delivered wet to Engelhard in sealed drums. In addition to thepads, the drums contained an alumina-supported palladim catalyst as well as various liquid organic compounds. Engelhard removed the drum contents while

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wet and placed them in steel pans which were loaded into one or more tray furnaces. There the materials were incinerated during a lengthy (overnight or longer) burn cycle. According to Mr. Bareford's first-hand observations, the interior of the furnace was "and almost blinding white color". In addition, an Engelhard air pollution permit states that the furnace exhaust gas discharge temperature was 1550 F (843 C). These facts establish that the chrysotile asbestos in the filter pads was heated to a temperature well in excess of that required to effect complete thermal decomposition. Accordingly, it is my opinion that, after incineration in Engelhard's furnaces, the residual material contained no asbestos.

Very truly yours,

s/ C. G. Bergeron
Clifton G. bergeron, Ph.D